

89-1820

Supreme Court, U.S.

FILED

MAY 21 1990

JOSEPH F. SPANIOLO, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ESTATE OF PATRICK R. COLLINS, DECEASED
TARA C. TRENT, EXECUTRIX,
Petitioner,

v.

UNITED STATES

Petition for a Writ of Certiorari to the United States Court
of Appeals for the Sixth Circuit

BURGESS L. DOAN
5710 Wooster Pike, Suite 212
Cincinnati, Ohio 45227
(513) 272-2493

Counsel of Record

Of Counsel:

Cohen, Todd, Kite & Stanford
525 Vine Street, 16th Floor
Cincinnati, Ohio 45202
(513) 421-4020

May _____, 1990



QUESTION PRESENTED

- I** Whether the decedent's estate is entitled to exclude from the gross estate a one-half interest in the real estate placed in trust by the decedent and his former spouse in connection with the dissolution of their marriage in 1976 or in the alternative whether the decedent's estate owed to his former spouse a lump sum equal to one-half of the fair market value of the real estate as an award of alimony-in-gross in lieu of her interest in the real estate.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Tara C. Trent, Executrix of the Estate of Patrick R. Collins, Deceased, and the respondent United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES	II
TABLE OF AUTHORITIES	V
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING WRIT	9
I. The Guidelines as set forth in <i>Commissioner of Internal Revenue v. Estate of Herman Bosch</i> , 387 U.S. 456 (1967) as applied by the Sixth Circuit Court of Appeals has resulted in the inclusion of phantom property in an estate for federal estate tax purposes while the actual property is owned by an unrelated party for state law purposes — a fear expressed by Justice Douglas in his dissenting opinion.	9
II. The Decision of the Sixth Circuit Court of Appeals is in conflict with the Second Circuit Court of Appeals in <i>Natchez v. U.S.</i> , 705 F2d 671 (1983) and the Supreme Court of the United States in <i>Harris v. Commissioner</i> , 340 U.S. 106 (1950).	16
III. The Court of Common Pleas retained jurisdiction to enforce its decree and resolve disputes among the parties as to their rights and duties under the decree pursuant to Ohio Revised Code 3105.65 and properly determined the ownership of property placed in trust by the decedent and his former spouse in connection with the dissolution of their marriage on September 8, 1976.	21
CONCLUSION	27

APPENDIX

Decree of Court of Common Pleas	1a
Separation Agreement	3a
Trust Agreement	10a
Motion of Modify Decree	12a
Entry Modifying Decree	14a
Decision of Trial Court	16a
Decision of Court of Appeals	39a
Entry Denying Motion for Rehearing	56a

TABLE OF AUTHORITIES

Cases	Pages
<i>Cherry v. Cherry</i> , 66 Ohio State 2d 348; 431 N.E. 2d 1293 (Ohio, 1981)	14
<i>Central Trust Co. v. Bovey</i> , 25 Ohio St. 2d 187 (1981)	26
<i>Commissioner v. Estate of Bosch</i> , 387 U.S. 456 (1967)	9, 10, 11, 12, 13, 14
<i>Estate of Henri P. Watson v. Commissioner</i> , 94 T.C. 16 (March 1, 1990)	25, 26
<i>Harris v. Commissioner of Internal Revenue</i> , 340 U.S. 106 (1950)	15, 16, 17, 20
<i>Homer v. Wullenweber</i> , 89 Ohio App. 255; 101 N.E. 2d 229 (Ohio, 1951)	14, 15, 16, 25, 26
<i>Ithaca Trust Co. v. U.S.</i> , 49 S.Ct. 291 (1929)	15
<i>Lillard v. Lillard</i> , 63 Ohio App. 403; 26 N.E. 2d 933 (Ohio 1939)	14, 15, 25, 26
<i>McClain v. McClain</i> , 15 Ohio St. 3d 289; 473 N.E. 2d 811 (Ohio, 1984)	18, 21, 22
<i>Meeks v. Meeks</i> , Sixth District Ct. App., Lucas County, July 23, 1982 Unreported	22
<i>Natchez v. United States</i> , 705 F2d 671 (2nd Circuit, 1983)	12, 16
<i>Rex v. Wyzaniski</i> , Sixth District Ct. App., Lucas County, August 6, 1982 Unreported	22
<i>Saeks v. Saeks</i> , 24 Ohio App. 3d 67; 493 N.E. 2d 280 (Ohio, 1985)	21, 22
<i>Wolfe v. Wolfe</i> , 46 Ohio St. 2d 399; 350 N.E. 2d 413 (Ohio, 1976)	14

Statutes:	Page
Title 26 U.S.C. Section 2033	3, 11, 12
Title 26 U.S.C. Section 2051	3
Title 26 U.S.C. Section 2053	3, 11
Ohio Revised Code Annotated	
Section 3105.65	18, 21, 22
Miscellaneous:	
<i>Scott on Trusts</i> , Vol. 1, page 38	26

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TARA C. TRENT, EXECUTRIX OF THE ESTATE OF
PATRICK R. COLLINS, DECEASED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

The Petitioner Tara C. Trent, Executrix of the Estate of Patrick R. Collins, Deceased respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on January 11, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 893 F2d 846 (1990) and is reprinted in the appendix hereto, p. _____.

Petition for Rehearing was denied *February 21, 1990* and is reprinted in the appendix.

The memorandum decision of the United States District Court for the Southern District of Ohio (Porter, D.J.) has not been reported. It is reprinted in the appendix hereto, p. _____.

The decree and entry modifying the decree the Court of Common Pleas is unreported and is reprinted in the Appendix hereto, p. 12A & 14A.

JURISDICTION

Invoking federal jurisdiction under 28. U.S.C. Section 1346 (a) (1), the petitioner brought this suit in the Southern District of Ohio, Western Division. The Southern District held for the Petitioner in part and granted a refund of Federal Estate Taxes.

On respondents's appeal, the Sixth Circuit on January 11, 1990, entered a judgment and an opinion reversing the decision of the Federal District Court of the Southern District and directed that petitioner's complaint be dismissed. A Motion For Rehearing was denied on February 21, 1990.

3
STATUTES INVOLVED

26 U.S.C. SECTION 2033. PROPERTY IN WHICH THE DECEDENT HAD AN INTEREST.

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

26 U.S.C. SECTION 2051. DEFINITION OF TAXABLE ESTATE.

For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the deductions provided for in this part.

26 U.S.C. SECTION 2053. EXPENSES, INDEBTEDNESS, AND TAXES.

(a) **GENERAL RULE.** — For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts —

- (1) for funeral expenses
- (2) for administration expenses
- (3) for claims against the estate, and
- (4) for unpaid mortgages on, or any indebtedness, in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate.

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

OHIO REVISED CODE SECTION 3105.65 POWER OF COURT.

(A) If, at the time of the hearing, either spouse is not satisfied with the separation agreement, or does not wish a dissolution of the marriage, the court shall dismiss the petition and refuse to validate the proposed separation agreement.

(B) If, upon review of the testimony of both spouses, and of the report of the investigator pursuant to the civil rules, the court approves the separation agreement and any amendments

to it agreed by the parties, it shall grant a decree of dissolution of marriage that incorporates the separation agreement. A decree of dissolution of marriage has the same effect upon the property rights of the parties, including rights of dower and inheritance, as a decree, retains jurisdiction to modify all matters of custody, child support, and visitation, and, only in accordance with division (D) (2) of section 3105.18 of the Revised Code, has authority to modify the amount or terms of alimony.

STATEMENT OF THE CASE

Patrick R. Collins, a resident of Hamilton County, Ohio died testate on August 1, 1981, at which time he was survived by his former spouse, Norma Jean Collins. After some twenty-four (24) years of marriage, (1952-1976), the parties elected to dissolve their marriage and the Court of Common Pleas of Hamilton County entered its decree on September 8, 1976. In connection with the dissolution they entered into a separation agreement which provided for the division of their property. The Separation Agreement divided all of their personal property, residential real estate and intangibles and provided that Patrick pay alimony to Norma Jean. The Separation Agreement provided that the commercial real estate which had been accumulated by the parties during their marriage be transferred to their trustee. The parties testified this was done to avoid partitioning of the property. The trust provided that the trustee hold the property "for the use and benefit of Patrick." Patrick managed the property, paid all expenses, mortgage payments and received all of the rental income. The trust provided the property could not be sold or encumbered with mortgages without the approval of both parties; that it could be terminated upon their mutual agreement and that it would terminate by its terms upon the death of either of the parties. The trust did not contain any provision which provided for an ultimate beneficiary upon termination. The trust terminated upon the death of Patrick R. Collins on August 2, 1981. Norma Jean Collins then demanded that the trustee convey her one-half of the property to her. The trustee then suggested to Norma Jean that she retain separate counsel for the purpose of proposing to the estate a division of the property which would avoid partitioning. Thereafter Norma Jean proposed to the estate that she receive as alimony-in-gross an amount equal to one-half of the fair market value of the property in lieu of her one-half of the property. The estate made a counter proposal that it would pay to her as alimony-in-gross one-half of the fair market value less the amount she had received as alimony during the period of time the property was held by the trustee. Norma Jean agreed. Upon Motion of Norma Jean the Court of Common Pleas, which granted the dissolution of marriage and approved the Separation Agreement in 1976, modified its

decree by awarding the total real estate to the decedent's estate and awarding to her a lump sum of alimony-in-gross in lieu of her one-half interest in the real estate on April 27, 1982. The Motion and Entry provided that this division of the property was as of September 8, 1976 and related back to the date of the decree of dissolution. The decedent's estate reported on its Federal Estate Tax Return, Form 706, the total real estate on Schedule A. The sum equal to one-half of the value of the property, as awarded to Norma Jean was reported on Schedule K as a debt of the estate. The net result was to include in the taxable estate the total value of the property less the amount awarded to Norma Jean or an amount equal to one-half of the total property as adjusted for prior alimony paid by Patrick during his lifetime.

The Internal Revenue Service determined that Norma Jean conveyed her entire interest in the property to Patrick when she and Patrick transferred the real estate to their trustee in 1976 and he therefore owned all of the real estate as of the date of his death. The Internal Revenue Service further concluded that since Patrick owned all of the real estate as a result of their joint conveyance to the trustee in 1976, the amount claimed as a debt owing to Norma Jean arising from the award of alimony-in-gross in lieu of her one-half interest in the real estate was disallowed and a deficiency in Federal Estate Tax was asserted. The estate paid the tax and filed a claim for refund which was denied. In its Claim for Refund, Form 843, the estate gave the following reasons as follows:

"The issue involved herein is whether the value of one-half of a parcel of real estate held in trust is includable in the gross estate. The taxpayer contends the real estate in question was not owned by the decedent but was owned beneficially by his former wife. In the alternative, the taxpayer contends the decedent's former wife has a valid, enforceable claim against the estate as allowed by the Court of Common Pleas of Hamilton County, Ohio."

Thereafter the estate brought an action in the Federal District Court for the Southern District of Ohio seeking a refund of taxes paid.

The District Court determined, based upon the testimony of the parties, the beneficiaries of the estate and the scrivener and trustee of the trust; and, an analysis of state law, that decedent's former spouse owned a one-half interest in the property held by their Trustee as of the date of Patrick's death, under the terms of their Separation Agreement and Trust. The District Court further determined that the Court of Common Pleas had jurisdiction to enforce its decree and to award to Norma Jean a lump sum of alimony-in-gross in lieu of her one-half interest, but that the value of her one-half interest should be reduced by one-half of the outstanding mortgages which encumbered the property. The government appealed the decision of the trial court and the estate cross appealed. The Sixth Circuit Court of Appeals held that the decision of the District Court was clearly erroneous for two reasons: (1) the decedent's former spouse had conveyed her entire interest in the property to Patrick in 1976 when she and Patrick jointly conveyed it to their Trustee; (2) the Court of Common Pleas was without jurisdiction to modify the decree of dissolution by awarding to Norma Jean a lump sum of alimony-in-gross in lieu of her one-half interest in the real estate held by their trustee.

The decedent's estate now faces the dilemma of a federal estate tax based upon the fair market value of the total property under federal law while one-half of the property (or a sum equal to the fair market value of one-half of the property) is owned by decedent's former spouse under the laws of the State of Ohio.

Upon receipt of the decision of the Court of Appeals, Counsel for the estate reviewed with the Court of Common Pleas the court's record and the question of the intention of the parties as it related to the division of their property in 1976, the affect of the trust agreement and the questions of the jurisdiction. The court confirmed that it had continuing jurisdiction to enforce its decree in this case. In addition the Honorable Paul George, retired, who presided over the Collins' case in 1976 also reviewed the file and gave his sworn statement to be submitted to the Court of Appeals with its petition for reconsideration. Judge George stated Norma Jean did not intend to convey her entire interest in the real estate to Patrick when they conveyed their property to the trustee in 1976.

The decedent's estate is currently in the process of seeking a determination of a higher state court as to the rights and duties of the parties as to the real estate in question.

REASONS FOR GRANTING THE WRIT

- I. **THE GUIDELINES AS SET FORTH IN *COMMISSIONER OF INTERNAL REVENUE V. ESTATE OF HERMAN BOSCH*, 387 U.S. 456 (1967) AS APPLIED BY THE SIXTH CIRCUIT COURT OF APPEALS HAS RESULTED IN THE INCLUSION OF PROPERTY IN AN ESTATE FOR FEDERAL TAX PURPOSES UNDER FEDERAL LAW WHILE THE ACTUAL PROPERTY IS OWNED BY AN UNRELATED PARTY FOR OWNERSHIP PURPOSES UNDER STATE LAW — A FEAR EXPRESSED BY JUSTICE DOUGLAS IN HIS DISSENTING OPINION.**

In *Commissioner of Internal Revenue v. Estate of Herman J. Bosch*, 387 U.S. 456 (1967) the Second Circuit Court of Appeals held that since the state trial court had “authoritatively determined” the rights of the parties, it was not required to delve into the correctness of that state court decree. Another panel of the same circuit held in the *Estate of Brewster*, 387 U.S. 456 (1967), that the decree of the Connecticut Probate Court under no circumstances can be construed as binding on a federal court in subsequent litigation involving federal revenue laws. This court heard both cases to resolve the conflict among the circuits, holding:

“where the federal estate tax liability turns upon the character of a property interest held by the decedent under state law federal authorities are not bound by the determination made of such property interest by a state trial court.”

In *Estate of Bosch*, *supra*, the decedent had created a revocable trust in 1930 which was amended in 1931 to provide that all of the income be paid to his wife during her lifetime. It also gave her a general power of appointment. In 1951 the wife purported to release the general power and convert it to a special power. In 1957 upon decedent's death the estate claimed a marital deduction for the value of the widow's trust. The commissioner determined that it did not qualify for the marital deduction because she did not have a general power. The estate

claimed the release executed by the wife in 1951 was invalid. The Supreme Court of New York determined during the pendency of the Tax Court action that the release was invalid. The Tax Court Allowed the marital deduction on the grounds that the state court had authoritatively determined the property rights involved. The Court of Appeals affirmed the Tax Court. This Court reversed the Court of Appeals.

In the companion case of *Estate of Brewster*, supra; the decedent died a resident of Connecticut where his will was admitted to the probate court. The will directed that "the provision of any statute requiring the apportionment of or proration of such taxes among the beneficiaries of his will or the transferee of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate." In 1958 the decedent executed a codicil to his will which gave his wife a general power of appointment over a trust for her benefit. The amount of the trust qualified for the marital deduction which was computed as one-third of the residue of the estate before reduction for any federal estate taxes. The Commissioner of Internal Revenue required that the estate tax be charged to the total estate prior to computing the deduction for the widow's trust. The estate then filed an application in the state probate court to determine, under state law, that none of the federal estate taxes be prorated to the widow's trust. No objection was filed by the other beneficiaries and the application was approved. The Commissioner denied the marital deduction for the widow's trust prior to the reduction for its share of federal estate tax. The District Court held for the government concluding that the state court determination is not binding upon a federal court in construing and applying the federal revenue laws. The Court of Appeals reversed holding that decedent's will controlled as to the proration of taxes and directed that the taxes were to be charged to the residual estate in spite of any state statute to the contrary. It did, however, agree with the District Court that the determination of the state probate court was not binding on the federal court. This Court affirmed the decision of the Court of Appeals.

The *Bosch* and *Brewster* decisions established the following rules:

1. Federal courts are not bound by a determination made of property interests by a state trial court where the highest court has not spoken on the point.

2. An intermediate appellate state court is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

3. The state law as announced by the highest court of the state is binding on a federal court.

While the rules established by *Bosch*, supra, are not limited to cases involving the marital deduction statute, they did arise out of a factual setting where the state court proceeding was concerned with the marital deduction for federal estate tax purposes.

The majority opinion written by Justice Clark in *Estate of Bosch*, supra relied upon Congressional intent as the underpinning for the decision.

“We find that the report of the Senate Finance committee recommending enactment of the marital deduction used very guarded language referring to the very question involved here. It said ‘proper regard’ not finality, should be given to the interpretation of the will by state courts and then only when entered by a court in a bona fide adversary proceeding. S PRT. NO. 1013, PT. 22, 80TH CONG. 2D SES., 4.

The Senate Report addressed the standard to be applied when facing an interpretation of wills by state courts on which depended the marital deduction, under Section 2056 of the Internal Revenue Code. Congress was concerned about the potential for abuse as between husbands and wives and sought to establish strict standards to protect the revenue against such abuse.

In the instant case we are concerned with a question of ownership of property which is addressed by Section 2033 of the Internal Revenue Code, or in the alternative the deductibility of a debt arising out of the division of marital assets in connection with a dissolution of marriage which is addressed by Section 2053 of the Internal Revenue Code.

Justice Douglas in his dissenting opinion in *Bosch*, supra, expressed his fear that the application of a standard arising out of that case would result in unfair and indeed unworkable decision as between the federal and state judicial decisions. He gave the following example to illustrate his point:

“Or take the case where the state court determines that X does not own a house. After X dies a federal court determines that the state court was wrong and that X owned the house, and it must be included in his estate even though it does not pass to his heirs. I cannot believe that Congress intended such an unjust result.”

His fears were well founded. In the instant case the State Court of Common Pleas approved the division of marital assets in 1976 in connection with the dissolution of their marriage which resulted in one-half of the property in question vesting in Norma Jean, his former wife. The Sixth Circuit, on the other hand, has determined that Norma Jean conveyed her entire interest to the decedent in 1976 and therefore the total property was owned by Patrick as of the date of his death. The question presented in this case goes beyond the question presented in *Bosch*, supra. There this Court was concerned with the proper computation of a marital deduction - a creature of federal law. The instant case on the other hand, depends solely upon concepts of property ownership which is a creature of state law. If the decedent does not own it, Congress did not intend for Section 2033 to reach it for federal estate tax purposes.

The property rights of the Collins' were determined by a state trial court in 1976, some five years prior to the decedent's date of death. The parties were divorced and continued to live separate lives from that time. That determination was not tax driven estate planning. It was a result of an agreement by the parties to divide their property and dissolve their marriage. As the second Circuit pointed out in *Natchez v. U.S.*, 705 F2d 671 (1983).

“When spouses transfer marital rights pursuant to a divorce and they or their representatives are dealing at arms lengths, *id.* at 112; Estate of Glen, supra. 45 TC at 334, the motives of such transfer is certainly not to deplete

the estate *intervivos*, so as to escape ultimate estate taxes upon death. *McMurty v. Commissioner*, 53-1 USTC 10,895, 203 F2d 659, 662 (First Circuit, 1953)."

The fear, expressed by Justice Douglas in his hypothetical in *Bosch*, *supra*, has become a nightmare in reality to the taxpayer in the instant case.

Justice Douglas stated:

"Not giving effect to a state court determination may be unfair to the taxpayer *and is contrary to congressional purpose of making federal tax consequences depend upon rights under state law*. The result will be to tax the taxpayer on his estate for benefits which he does not have under state law. This aspect is emphasized in *Blair v. Commissioner*, *supra*, where the government attempted to tax the taxpayer for income to which he had no right under state law.

Justice Douglas feared the rules established based on the underpinning of Congressional intent as to the allowability of a marital deduction would result in unfair and unworkable decisions when applied to the cases presenting traditional concepts of ownership under state law.

So it is in the instant case. The decision of the Sixth Circuit, if allowed to stand will impose upon the estate a tax on property which was not owned by the decedent under state law as of the date of his death. The result is a tax that is confiscatory. For example, if A owns a one-half interest in Black Acre which has a total value of \$100,000 his estate should pay a tax on a value of \$50,000. If the estate tax rates is 55% the tax is \$27,500. If the government asserts a tax on all of Black Acre, i.e. (55% of \$100,000 = \$55,000), the federal estate tax is greater than the value of A's one-half interest which he owns under state law and the property is thereby confiscated.

Patrick and Norma Jean divided their property in connection with the dissolution of their marriage in September of 1976 at a time when both parties clearly enjoyed a common ownership of the properties under the laws of the State of Ohio. The record is abundantly clear that the properties were

accumulated during their marriage and were therefore marital assets. *Wolfe v. Wolfe*, 46 Ohio St. 2d 399; 350 N.E. 2d 413 (Ohio 1976); *Cherry v. Cherry*, 66 Ohio St. 2d 348; 421 N.E. 2d 1293 (Ohio 1981). The properties in question were placed in a trust where they were to remain until such time as the parties (Patrick and Norma Jean) agreed to terminate the trust or until the death of either party. The parties did not terminate the trust prior to Patrick's death and accordingly it terminated by its terms upon his death. The trust made no provision for the disposition of the property upon termination of the trust. The state Court of Common Pleas held that the parties owned the property in equal shares and awarded to Norma Jean one-half of the value of the property. The Federal District Court, Judge Porter, a former judge of the State of Ohio Court of Common Pleas, under the authority of *Bosch*, supra, made a determination as to the ownership of the property independently of the determination of the Court of Common Pleas. Judge Porter held that the parties owned the property in equal shares at the time they conveyed it to their trustee in 1976 as a matter of state law. He cited as his authority *Wolfe v. Wolfe*, supra and *Cherry v. Cherry*, supra. Next Judge Porter examined the terms of the trust and concluded that upon the termination of the trust under Ohio law the corpus would revert to Settlers. He cited *Lillard v. Lillard*, 63 Ohio App. 403; 26 N.E. 2d 933 (Ohio 1939) and *Homer v. Wullenweber*, 89 Ohio App. 255; 101 N.E. 2d 229 (Ohio 1951) as the controlling law of the State of Ohio. Norma Jean testified that it was the intention of the parties at the time the trust was created that they continue to own the property in equal shares. This is corroborated by the testimony of the trustee who drafted the agreement for Patrick and Norma Jean, and held title to the properties. The executrix of the estate agreed that Norma Jean was a one-half owner of the real estate based upon the advice of the trustee who was then counsel for the estate. The trial court, Judge Porter, agreed with the determination of the court of common pleas except that he imputed to Norma Jean one-half of the mortgages. The Sixth Circuit has held, however, without any discussion of state law, that Norma Jean conveyed away her entire interest in the property when she conveyed it to the trust and retained only a security interest during the term of the trust to secure the payment of

alimony. Under that reasoning there remains an inexplicable lacuna which the Court does not address. If the trust terminates upon the death of Patrick (which it does by its own terms) when her security is most important to her, why would she agree that the security could disappear?

The taxpayer's estate now owes Norma Jean the amount representing the lump-sum award of alimony-in-gross in lieu of her one-half interest in the property, or in the alternative if the Court of Common Pleas was without jurisdiction to award the lump sum of alimony-in-gross in lieu of the property then she is the owner of one-half of the property by virtue of the terms the trust under the laws of the State of Ohio. Meanwhile the estate faces a tax on property which was not owned by the decedent, Patrick, at the time of his death.

While Congress did intend to apply strict standards for purposes of construing the marital deduction statute, it did not intend to apply the Federal Estate Tax to property in which the decedent had no interest at the time of his death.

In this regard *Harris v. Commissioner*, [50-2 USTC 10,786] 340 U.S. 106, 110 (1950), requires:

"If there is no decision by the court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956)."

The Sixth Circuit Court of Appeals has failed to give "proper regard to relevant rulings of other courts of the state" as it concluded that Norma Jean conveyed her entire interest in the property to the trustee. She did indeed and so did Patrick, subject, however, to the terms of the trust which gave each of them a revisionary interest under state law. However, it has failed to address the question of who owned the property in question at the moment of Patrick's death, i.e. upon termination of the trust, which is the critical moment for federal estate tax purposes. *Ithaca Trust Co. v. U.S.*, 49 S.Ct. 291 (1929). This question must be answered by applying state law as set forth in *Lillard v. Lillard*, *supra*, and *Homer v. Wullenweber*, *supra*, which are clear as to the answer.

II. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE SECOND CIRCUIT COURT OF APPEALS IN *NATCHEZ V. U.S.*, 705 F2d 671 (1983) AND THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN *HARRIS V. COMMISSIONER*, 340 U.S. 106 (1950).

When a claim against an estate is founded on a divorce decree the estate is entitled to deduct the full amount of the claim under 2053 (a) (3) for the transfer is deemed an involuntary liability imposed by law. *Harris v. Commissioner*, supra. The Second Circuit Court of Appeals in *Natchez*, supra, held that the decedent's estate was entitled to a deduction for an amount agreed to in a separation agreement and incorporated into a Mexican divorce decree as a claim against the estate in reliance on *Harris*, supra. In that case the parties who were residents of the State of New York executed a separation agreement in 1970 which provided:

"Will give to the wife . . . \$80,250.00 for her support and maintenance now and in the future and the wife hereby accepts such payment in exchange for her release [of] all rights to claim the alimony and support from the husband now and in the future."

That provision was unenforceable under New York law in 1970 at the time the agreement was entered into.

However, the parties were subsequently granted a decree of divorce by a Mexican court in 1970 wherein the decree approved the separation agreement and declared that the agreement survived the decree. The Mexican court was without power to alter the terms of the agreement but did have the power to approve the agreement. Accordingly the amount of the claim as agreed by the parties in their separation agreement was found upon the decree of divorce.

The decedent died in 1976 leaving a will in which he directed his executor to pay his former wife the amounts as required by the separation agreement. The District Court held that the claim of Gladys Natchez, his form wife, was founded on the Mexican divorce decree and the estate was therefore entitled to

deduct the payment as a claim against the estate. The Second Circuit Court of Appeals affirmed, holding that:

"When a claim against an estate by a decedent's former spouse is founded on a divorce decree, however, as opposed to a "promise or agreement," the estate is entitled to deduct the full amount of the claim under 2053 (a) (3). Such claims are deductible even if based on the relinquishment of marital rights, without regard to consideration, for the transfer is deemed an involuntary liability, imposed on the estate not by agreement but by law. *Harris v. Commissioner*, supra.

In *Harris v. Commissioner*, supra, the same principal was involved but in a gift tax case. In that case the parties were divorced in Nevada at which time they owned substantial property interests. In connection with dividing their property the husband received \$107,105 more than the wife received. The Internal Revenue Service asserted a gift tax on the excess amount received by the husband on the grounds that it was a transfer founded on a promise that effected a relinquishment of marital rights in property. This Court pointed out that the parties did not simply undertake a voluntary contractual division of their property interest, but instead, it was a settlement of their property rights in the event a divorce should be decreed. The court observed:

The decree, not the arrangement submitted to the court, would fix the rights and obligations of the parties. That was the theory of *Commissioner v. Maresi*, 156 F2d 929 [4601 USTC ¶ 10,276] and we think it sound . . . The happenstance that the divorce court might approve the entire settlement or modify it in unsubstantial details or work out material changes seems to us unimportant. In each case it is the decree that creates the rights and the duties; and a decree is not a "promise or agreement" in any sense - popular or statutory.

In the instant case the estate and decedent's former spouse agreed to convert her interest in certain real estate to a lump sum award of alimony-in-gross. The Court of Common Pleas approved the agreement by way of an Entry Modifying its

decree. The estate claimed the award of alimony-in-gross as a claim against the estate. The trial court agreed with the state court, however, the Sixth Circuit has held that the Court of Common Pleas did not have jurisdiction to modify its decree by awarding to Norma Jean a lump sum of alimony-in-gross in lieu of her one-half of the property, and accordingly the modification did not create a claim or debt which is deductible for federal estate tax purposes, citing *McClain v. McClain*, 15 Ohio St. 3d 289; 473 N.E. 2d 811 (Ohio, 1984). The case held that a Court of Common Pleas could not modify a decree for the purpose of modifying an award for sustenance alimony.

The modification of the decree by the Court of Common Pleas in the instant case did not modify sustenance alimony nor did it either enlarge or diminish Norma Jean's share of the marital property — it simply converted her one-half interest in the underlying properties to a lump sum award of alimony-in-gross. Her claim was in every sense founded on the original divorce decree as it was the decree granting the dissolution in 1976, which determined their property rights.

The Court of Common Pleas granted a decree of divorce in a dissolution of their marriage in September 1976 pursuant to the provision of Ohio Revised Code 3105.65. That statute requires that all provisions relating to a division of marital assets, support and alimony be agreed to by the parties as a condition of granting the decree. The Collins' negotiated their own agreement and retained their family lawyer to reduce the agreement to writing and to serve as trustee under the terms of their agreement. The Separation Agreement in Item B.3 provided that they transfer certain commercial properties to a trust as follows:

"All other real estate now owned by the parties hereto, either individually or jointly, shall be transferred of record, to a trustee mutually agreed upon by the parties hereto for the use and benefit of Patrick."

Item 2 of the trust agreement provides:

Pursuant to the provision of Item 3.B.3 of the Separation Agreement executed by Norma Jean and Patrick on July 28,

... to J.R. Nieberding, Trustee, for the use and benefit of Patrick. This Agreement shall detail the obligations and responsibilities of the Trustee, his successors and assigns.

A. The Trustee shall hold the title to the real estate for the use and benefit of Patrick and to secure the payment of Alimony as provided in Item 7 B. C. & D. of the Separation Agreement, executed by Norma Jean and Patrick on July 27, 1976.

B. The duties and obligations of the Trustee herein shall terminate on the death of Norma Jean or Patrick, or as otherwise agreed upon by the parties.

C. The Trustee shall not sell or otherwise transfer or mortgage said real estate without the written consent of Norma Jean and Patrick.

D. The Trustee shall not have any responsibility or liability for the construction, maintenance, repair, occupancy, rental taxes, assessments, insurance, mortgages, liens or other encumbrances, incidental to arising from, or otherwise relating to said real estate.

E. Patrick shall be responsible and liable for all expenses incurred by and on behalf of said Trustee in connection with said real estate.

F. In the event of the death or resignation of the Trustee, the parties hereto shall select and appoint a successor trustee.

G. The Trustee shall not be required to give bond.

H. The Trustee agrees to forward to Patrick any and all tax bills, insurance premium notices, and any and all papers or notices relating to or arising out of said real estate.

The trust contained no other provisions or directions as to the duties of the trustee upon termination of the trust. 1976, Norma Jean and Patrick have executed and delivered general warranty deeds for the following real property:

The trust terminated by its terms upon the death of Patrick in August of 1981 without any provision as to the disposition of the trust property. Norma Jean, the decedent's former spouse, demanded of the trustee her one-half of the property. He (the trustee) was at that time counsel for the estate. Since he was

aware of the original objectives of the parties at the time they placed the property in trust, he urged Norma Jean to retain separate counsel to propose to the estate a division of the property which would achieve the original intent of the parties to avoid a partition of the properties. Norma Jean did retain separate counsel and a proposal was made to the estate that she receive as her share of the property a sum equal to one-half of the fair market value as a lump sum award of alimony-in-gross. The estate countered with an offer of a lump sum award of one-half of the fair market value reduced by the amount she had received as alimony from the date of the decree in 1976 through the decedent's date of death in August of 1981. Norma Jean agreed to the estate's counter offer and the Motion to Modify their Separation Agreement to award Norma Jean a lump sum award of alimony-in-gross in lieu of her one-half interest in the property was presented to the Court of Common Pleas. After an appearance in open Court by counsel for the parties and the representatives and beneficiaries of the estate the Motion was approved by the Court.

The property rights that are at issue in this case arose in 1976 by virtue of the decree granted in connection with the dissolution of the marriage. The modification which occurred in 1982 did not purport to create property rights as to Norma Jean or the decedent Patrick, which they did not possess at the time of the dissolution in 1976, but simply completed the division of the property which they jointly placed in trust in 1976. Their respective property rights and Norma Jean's claims against the estate for her one-half of that property was clearly founded upon a divorce decree and accordingly is fully deductible as a claim against the estate. *Harris v. Commissioner*, supra.

III. THE COURT OF COMMON PLEAS RETAINED JURISDICTION TO ENFORCE ITS DECREE AND RESOLVE DISPUTES AMONG THE PARTIES AS TO THEIR RIGHTS AND DUTIES UNDER THE DECREE PURSUANT TO OHIO REVISED CODE SECTION 3105.65 AND PROPERLY DETERMINED THE OWNERSHIP OF PROPERTY WHICH WAS PLACED IN TRUST BY THE DECEDENT AND HIS FORMER SPOUSE IN 1976.

The Sixth Circuit Court of Appeals reversed the District Court holding that:

“The modified alimony decree was void under Ohio Law because the Common Pleas Court under that law was without jurisdiction to render the decree.”

The Court of Appeals cited as its authority a decision of the Supreme Court of Ohio. In *McClain v. McClain*, supra, which held that a court of common pleas does not have jurisdiction to modify its decree for the purpose of altering an award of sustenance alimony to which the parties to a dissolution of marriage have agreed. That case represents the law of Ohio as it applies to periodic sustenance alimony awards. However that was not the issue presented to the Court of Common Pleas in *Collins v. Collins*.

The Collins' case was not dealing with a modification of an award of sustenance alimony; but, was concerned with a division of the underlying marital assets in a situation where a good faith question existed as to the rights and duties of the parties. One of the parties (Patrick) was then deceased and the trust which held the property had terminated without providing for a beneficiary. The personal representative of the estate was not a party to the agreement and she accordingly relied upon the trustee as to the agreement and the intention of the decedent Patrick and Norma Jean. She agreed that Norma Jean was entitled to one-half of the property held by the trustees.

The Court of Appeals failed to consider a more recent Ohio State court decision which addressed the question of jurisdiction under the same statute. In *Saeks v. Saeks*, 24 Ohio App. 3d 67; 493 N.E. 2d 280 (1985), the Montgomery County Court of Appeals held:

"The court of Common Pleas has continuing jurisdiction in dissolution cases under Ohio Revised Code 3105.65 to resolve good faith questions which arise under the terms of a separation agreement dealing with the division of marital property."

In addition to *Saeks v. Saeks*, supra, which was decided after *McClain v. McClain*, supra, other state appeals court decisions decided prior to *McClain* are consistent with *Saeks*, especially *Rex v. Wyzaniski*, 6th District Ct. App., Lucas County, August 6, 1982, Unreported and *Meeks v. Meeks*, 6th District Ct. App., Lucas County, July 23, 1982. Unreported.

In *Saeks*, supra, the parties agreed at the time of their dissolution that the wife would receive a percentage of the profits from the husband's insurance agency business which he operated as a sole proprietorship. The husband incorporated his business subsequent to the dissolution of the marriage at which time he became a salaried employee. He thereafter paid to his wife the same percentage of his income (salary) from the corporation which was less than the profit which would have been the basis for computing the wife's share if he had continued to operate as a proprietorship. The court held the husband could not use the corporation to defeat the wife's right to share in the income of the insurance agency. The court further held that it had continuing jurisdiction to resolve good faith questions arising among the parties regarding their division of property or as to the terms of a separation agreement in a dissolution case under *Ohio Revised Code 3105.65*.

In *Rex v. Wyzaniski*, supra, the husband was required pursuant to a divorce decree to provide the wife with the use of a garage until a loan was paid in full. The husband sold the garage prior to full payment of the loan. The wife sought an order from the Court of Common Pleas requiring the husband to reimburse her for the cost of renting another garage. The husband argued that the court did not have jurisdiction to modify the separation agreement. The court held that it had jurisdiction in that case because it was an enforcement of its decree rather than a modification.

In *Meeks v. Meeks*, supra, the Sixth District Court of Appeals held that the trial court (Court of Common Pleas) had

continuing jurisdiction to settle a dispute between the parties as to which party was entitled to certain items of personal property, where the entitlement to the personal property was not provided for in the decree of divorce.

The instant case of *Collins v. Collins* presented to the Court of Common Pleas a question as to the rights of the parties to certain real estate which they had placed in a trust pursuant to the terms of a separation agreement entered into by them in connection with the dissolution of their marriage. The parties were not seeking modification of sustenance alimony payments nor a modification of the division of marital assets. They were completing the division of the property which they had placed in trust for the purpose of avoiding a partition of the property at the time of the dissolution of their marriage. This case presented a situation wherein one of the parties to the dissolution was then deceased. The surviving party was dealing with Patrick's executrix who was not a party to the original agreement. The executrix agreed to a division of the property which she believed was consistent with the intent of the parties at the time of their divorce.

The decedent by way of his last Will and Testament gave his executrix the authority to negotiate a settlement with his former spouse, Norma Jean, and had during his lifetime instructed her to "do everything you can to salvage these properties."

In addition to holding that the court of common pleas was without jurisdiction to modify its decree the Sixth Circuit held as to the decision of the District Court,

"a determination, if it had made such a determination, that Norma Jean owned one-half of the trust property (subject to the mortgages) at the time of Patrick's death . . . would have been clearly erroneous."

In reaching its decision it cited the following reasons: First, ". . . the estate tax return which has never been amended by the estate in this respect shows the real estate as being the property solely of Patrick at the time of his death." Secondly, "the documents executed by the parties at or about the time the property was conveyed by Patrick and Norma Jean to the Trustee demonstrate beyond doubt that Norma Jean retained only a security interest to guarantee payment of her alimony payments.", and Thirdly, "There is no indication in the Will

[of Patrick] that any part of the trust property belonged to or would revert to Norma Jean.

THE FEDERAL ESTATE TAX RETURN WAS PROPERLY PREPARED AND AMENDED PURSUANT TO THE GUIDELINES PROVIDED BY THE COMMISSIONERS REGULATIONS AND CLEARLY SHOWS THE AMOUNT OWED TO NORMA JEAN IN LIEU OF HER ONE-HALF INTEREST IN THE PROPERTY

The property was reported on Schedule A of Form 706, the Federal Estate Tax Return as belonging to Patrick, however, Schedule K of Form 706 which is an integral part of the same return clearly sets forth the debt which represents the amount awarded to Norma Jean in lieu of her one-half interest in the property.

The Court of Common Pleas approved a division of the property as of September 8, 1976, the date of the decree of dissolution. Accordingly, the Federal Estate Tax Return conformed to the determination of the property ownership as decided by the Court of Common Pleas in its Entry of April 27, 1982.

The Federal Estate Tax Return Regulations at Section 20.6081-1(c) provides:

*“(c) A return as complete as possible must be filed before the expiration of the extension period granted. *** Except as provided in Section 20.2032 (A)-8(d) and Section 20.6166-1 (h), the return cannot be amended after the expiration of the extension period although supplemental information may subsequently be filed that may result in a finally determined tax different from the amount shown as the tax by the executor on the return.*** Emphasis Provided. (1)*

To amend a position or the reporting of an item, the Estate is required by the Regulations to submit additional information as may affect the amount of tax, but there is no provision for, and indeed the Internal Revenue Service does not process an Amended Estate Tax Return. The Plaintiff followed the procedure outlined in the Regulations; it submitted to the Internal Revenue Service the additional documentation to confirm the fact that the Court of Common Pleas awarded alimony-in-gross to Norma Jean and all of the property to

Patrick. In addition to submitting the supplemental information during the audit, the estate filed a Claim, Form 843, within the statutory period, wherein it again set forth its position as to the ownership of the property in question.

Nevertheless the Sixth Circuit held that the federal estate tax return was evidence that Patrick owned all of the property. The Sixth Circuit did not address the fact that the same return reported a claim against the estate on Schedule K representing Norma Jean's claim in lieu of her one-half interest in the property; nor does it address the fact that the estate filed a Claim for Refund with the Internal Revenue Service which again sets forth the equal ownership of the property in both Patrick's estate and Norma Jean, or in the alternative the debt owing to Norma Jean in lieu of her interest in the property.

Either theory results in the same amount of federal estate tax. If reporting the property on Schedule A of the Federal Estate Tax Return was evidence that it belonged solely to Patrick this evidence must by the same rule disappear once Schedule K of the same return is considered.

**THE DOCUMENTS EXECUTED BY THE PARTIES
DEMONSTRATE THAT PATRICK'S ESTATE AND
NORMA JEAN OWNED THE PROPERTY
EQUALLY AT THE TIME OF PATRICK'S DEATH.**

Next, the Sixth Circuit concludes that the documents executed by the parties at the time of the dissolution demonstrate that Norma Jean retained only a security interest in the property. The documents executed at that time consist of the separation agreement which provided that the property be conveyed by Patrick and Norma Jean to the trustee; the deeds which were examined by Judge Porter who found that both parties executed the deeds; and finally the trust agreement, which by its terms terminated at the moment of Patrick's death without any provision as to the ultimate disposition of the property. *Lillard v. Lillard*, *supra*, and *Homer v. Wullenweber*, *supra*, are precisely on point in the issue presented in this case. Although those cases represent decisions of intermediate appellate courts, they are consistent with the general rule as to the issue presented and must be given "proper regard" by federal courts.

This precise issue was addressed by the Tax Court in a very recent decision which held that the rule as set forth in *Lillard* is consistent with the law of Mississippi. *Estate of Henri Watson v. Commissioner*, 94 T.C. 16 (March 1, 1990).

**THE DECEDENT'S WILL CANNOT VARY THE
TERMS OF THE TRUST CREATED BY HE AND
NORMA JEAN**

The Sixth Circuit, finally, looks to the Will of the decedent Patrick and apparently views as further evidence the statement in his will: "I am the owner of certain real estate which is held by my attorney, J.R. Neiberding, pursuant to the separation agreement." There are numerous reasons the Sixth Circuit is in error as to this point: First, the language of Patrick's will does not say that he owns all of the property held in the trust by his attorney, J.R. Nieberding. It says he is the owner of certain "real estate." It is probable that Norma Jean would make a similar statement in her will to describe her interest in the property held by the trustee.

The law of Ohio is well settled as to the ability of Patrick to vary the terms of the trust agreement he and Norma Jean created by way of his Last Will and Testament. Under Ohio Law, there is a long standing example from a case which is precisely on point with the instant case. That case states in unequivocal terms: "He left a Will which presumably expressed his final wish. But, these subsequent acts and declaration are not effective to directly disturb the irrevocable trust or to indirectly do so by influencing an interpretation of its terms contrary to the words used in the circumstances then existing." *Lillard v. Lillard*, *supra*.

The Sixth Circuit cites *Trust Co. v. Bovey*, 25 Ohio St. 2d 187 (1971) wherein the Supreme Court of the State of Ohio confirms that the intentions of the parties control. However, the question of intent must be determined under the rules of law of the State of Ohio. That case involved the question of whether the term "child or children" in an Ohio trust created in 1930 included adopted children. The Ohio Supreme Court held that the term "child or children" must be construed under the law as it existed at the time the document was created.

That case tends to support the estate's argument in the instant case. If we are to follow the state law of Ohio in connection with the interpretation of the trust document as it existed at the time the instrument in question was created, there is no doubt but that the property transferred to an Ohio trust, without providing for an ultimate beneficiary upon termination, would result in the property to the grantors or their estate in proportions to their original ownership. *Lillard v. Lillard*, supra; *Homer v. Wullenweber, Jr.*, supra; *Scott on Trusts*, Vol 1, p. 38; *Estate of Henri Watson v. Commissioner*, supra.

CONCLUSION

For these various reasons, this petition should be granted.

APPENDICES

TABLE OF CONTENTS

APPENDIX	Page
A Decree of Court of Common Pleas	1a
B Separation Agreement	3a
C Trust Agreement	10a
D Motion to Modify Decree	12a
E Entry-Modifying Decree	14a
F Findings of Fact and Conclusions of Law	16a
G Judge Porter's Letter of February 16, 1988 Amending Memorandum and Offers of Trial Court	29a
H Judgment Entry of Trial Court	31a
I Memorandum and Orders of Trial Court	34a
J Decision of Court of Appeals	39a
K Entry Denying Motion For Rehearing	56a

la
**COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO**

IN THE MATTER OF

Norma Jean Collins
and
Patrick R. Collins,
Petitioner

The Court finds that the Petitioners, Norma Jean Collins and Patrick R. Collins, have each been a resident of the State of Ohio for at least six (6) months immediately preceeding the date of the filing of the Petition herein.

The Court finds that the Petitioners were married in Cincinnati, Ohio, on December 23, 1952.

The Court further finds that two (2) children were born of said marriage, Tara Carmel Trent, age 20, and Tamara Lynn Collins, age 16.

This matter came on for hearing before the Court on September 3, 1976; more than 30 days having elapsed after the filing of the Petition; the parties appeared personally before Paul J. George, Judge of this Court.

The Court finds that the Petitioners, upon examination under oath, each voluntarily entered into the Separation Agreement embodied in the Petition, that each Petitioner is satisfied with the terms of the Separation Agreement, as set forth herein, and that each Petitioner desires to have the marriage dissolved.

Upon review, the Court hereby approves the Separation Agreement submitted by the Petitioners.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. The marriage existing between the Petitioners be, and the same hereby is, dissolved, and the parties are hereby released from the obligations of their marriage, except as herein after set forth.

2a

2. The Petitioners are ordered to fulfill each and every obligation imposed by the Separation Agreement agreed to and executed by the Petitioners, a copy of which is attached hereto and by reference made a part of this Decree.

3. All payments of alimony shall be made through the Bureau of Support.

4. That each Petitioner be, and hereby is, directed to deliver all other titles, documents, papers, and things necessary to effectuate the terms of the Separation Agreement.

5. That the cost of this proceeding be paid by the Petitioner, Patrick R. Collins.

S/ _____
Paul J. George, Judge

S/ _____

S/ _____

S/ _____
Nieberding & Nieberding Co. L.P.A.
Attorneys for Petitioner

ENTERED
Sep -8
IMAGE 365

3a
SEPARATION AGREEMENT

This Separation Agreement by and between the stated parties made at Cincinnati, Ohio, on this 27th day of July, 1976.

WITNESSETH:

That which each party agrees to undertake and perform according to the following terms and conditions, to-wit:

ITEM 1 - PARTIES

The Parties to this Separation Agreement are

- a) Norma Jean Collins, 7730 Jolain, Cincinnati, Ohio 45242, hereinafter referred to as Norma Jean; and
- b) Patrick R. Collins, 7730 Jolain, Cincinnati, Ohio 45242, hereinafter referred to as Patrick.

ITEM 2 - PURPOSE

Because serious marital differences have arisen between the parties who were married on the 23rd day of December, 1952, at Cincinnati, Hamilton County, Ohio, which make it impossible for them to live together as husband and wife and are the cause for the filing of a Petition for Dissolution of Marriage in the Court of Common Pleas, Division of Domestic Relations, Hamilton County, Ohio, the parties have mutually expressed a desire to settle and adjust all matters relating to their mutual property rights to which either might be entitled in the event of dissolution;

Accordingly, the parties have directed and agreed that the subject and terms of their agreement be reduced to writing for their respective signature and execution and to be incorporated into their Petition for Dissolution, and to make an equitable distribution of their property and to settle all claims thereunder.

ITEM 3 - DISTRIBUTION OF PROPERTY

A. Personal Property

1. A. Norma Jean shall retain as her sole property all of the household furnishings located at 823 Rockhill Street, Deltona, Florida, and all other personalty presently in her possession or here after acquired by her not specifically set out in this Agreement.

B. Norma Jean shall retain as her sole property all rights, title and interest in and to Savings Account #2002930, First Federal Savings & Loan Association of Deland, Deland, Florida.

C. Norma Jean shall receive title to and retain as her sole property, the following:

1. The 1976 Chevrolet 2 Door Sport Coupe, Model 1HV11 Vega, Serial #1V11A6U129697;
2. The 1972 Yamaha Motorcycle, Model LT2, Serial #LT2000982;
3. The 1972 Yamaha Motorcycle, Model AT2, Serial #AT1178040;
4. The 1972 Yamaha Motorcycle, Model CS5, Serial #CS3212194.

2. A. Patrick shall retain as his sole property all of the household furnishings located at 7730 Jolain Drive, Cincinnati, Ohio, and all other personalty presently in his possession or hereafter acquired by him not specifically set out in this Agreement.

B. Patrick shall retain as his sole property, all rights, title and interest in and to Checking Account #533-06898, The Fifth Third Bank, Cincinnati, Ohio; Savings Account #15573 and Certificates of Deposit #908002 and #908001, Seven Hills Saving Association, Cincinnati, Ohio.

C. Patrick shall retain as his sole property, the following:

1. The 1973 Lincoln Continental 2 Door Coupe, Model 89 Mark IV, Serial #3Y89A876662;
2. The 1965 Chris Craft, Model Cavalier 210's, 33 foot, Serial #VXB 33 003T; and two (2) Chris Craft Motors, Serial #327FS08133 and #327FS07664;
3. The 1973 Playboy runabout, Serial #728347 equipped with 20 H.P. Mercury Outboard Motor;
4. The 1974 Yamaha Motorcycle, Model TX500A, Serial #371 113614;
5. The 1972 Yamaha Motorcycle, Model LT2, Serial #LT2 001126.

D. Patrick shall retain as his sole property all rights, title and interest in and to the common stock of P. R. Collins Plumbing Company, Inc. issued in his name, together with all

dividends and options attributable thereto; Patrick shall further receive and/or retain all rights, title and interest in and to the business known as Collins Construction Co. and Collins Ready-Mix Concrete Co.

B. Real Property

1. Norma Jean shall receive and retain as her sole property, the residence property known as Lot 6, Block 176, of Deltona Lakes, Unit 24, Volusia County, Florida, known and designated as 823 Rockhill Street, Deltona, Florida.

2. Patrick shall receive and retain as his sole property, the residence property known as Lot 2, Jolain Acres Subdivision, Block "A", Hamilton County, Ohio, known and designated as 7730 Jolain Drive, Cincinnati, Ohio.

3. All other real estate now owned by the parties hereto, either individually or jointly, shall be transferred of record, to a trustee mutually agreed upon by the parties hereto for the use and benefit of Patrick.

ITEM 4 - DEBT

A. Both parties agree that all debt obligations are current and that neither has incurred any additional obligation which has not been disclosed to the other.

B. Patrick agrees to assume and pay and be solely responsible and liable for all outstanding debt to the date hereof, which has been incurred by the parties during their marriage, and to hold Norma Jean harmless thereon.

C. Each party further agrees to assume and pay any debt obligations not specifically set out herein that they may have contracted to assume and further agree not to assume any further obligations that would obligate the other of them and in the event one should, to save the other harmless thereon.

ITEM 5 - CUSTODY AND SUPPORT

A. Patrick shall have the sole care, custody and control of Tamara Lynn Collins, and shall be entitled to the Federal and State dependent deduction for the support of said minor child.

B. Norma Jean shall have the right to visit said minor child at any reasonable time upon giving advance notice to Patrick.

ITEM 6 - LIFE INSURANCE

A. Patrick shall retain ownership of all life insurance policies now in force on his life, together with the right to designate beneficiaries thereon.

B. Patrick shall retain ownership of and maintain the life insurance policy now in effect through Liberty Mutual on the life of Norma Jean, together with the right to designate the beneficiary thereon.

ITEM 7 - ALIMONY

A. Patrick shall pay to Norma Jean the sum of Fifteen Thousand (\$15,000.00) Dollars as a lump sum cash settlement prior to the entry of a Decree of Dissolution of Marriage.

B. Patrick shall pay to Norma Jean the sum of Thirteen Thousand (\$13,000.00) Dollars per year in equal monthly installments commencing with the execution of this Agreement, for and during the term of her natural life so long as she does not remarry. In the event of her remarriage, Patrick shall pay to Norma Jean the sum of Ten Thousand, Four Hundred (\$10,400.00) Dollars per year in equal monthly installments commencing with and calculated as of the date of remarriage, and continuing for and during the term of her natural life.

C. The alimony payment set forth in Item 7 (B) shall be increased annually by a cost-of-living adjustment to be determined as of the anniversary date of the Decree of Dissolution of Marriage of the parties hereto. Said cost-of-living adjustment shall be based on and determined by the Consumer Price Index For Urban Wage Earners and Clerical Workers, All Items, Cincinnati, of the Bureau of Labor Statistics of the U.S. Department of Labor. In the event such Consumer Price Index is no longer published, the parties agree to adopt as an index a comparable official index or indicator of living costs. In no event shall said payments of alimony hereunder be less than Ten Thousand, Four Hundred (\$10,400.00) Dollars annually, beginning with the year 1977.

D. Patrick shall pay to Norma Jean as an additional alimony hereunder the sum of Five Thousand (\$5,000.00) Dollars on every third (3rd) anniversary date of the Decree of Dissolution of Marriage of the parties hereto, beginning in the year 1979, and continuing thereafter for and during the term of her natural life.

ITEM 8 - COSTS AND ATTORNEY FEE

Patrick agrees to pay all Court costs and attorney fees in connection with and incidental to this Separation Agreement and Petition for Dissolution. Any subsequent expense shall be borne by the respective parties individually or as the Court may direct.

ITEM 9 - DISSOLUTION OF MARRIAGE

A. Norma Jean and Patrick agree that in the event their Petition for Dissolution of Marriage is granted, and subject to the approval of the Court, this Separation Agreement shall be incorporated in and become part of the Decree granted.

B. Each party shall and will, at any time or times, make, execute and deliver any and all such further assurances and things as the other of said parties shall reasonably require, for the purpose of giving full force and effect to this Agreement and to the covenants, conditions, provisions and promises thereof.

ITEM 10 - EXECUTION

IN WITNESS WHEREOF, the named parties have executed this Agreement in triplicate and acknowledged the exchange of valuable consideration therefore this 27th day of July, 1976.

Witnesses:

Norma Jean Collins

Patrick R. Collins

STATE OF OHIO :
HAMILTON COUNTY: SS.

Before me, a Notary Public for said state, personally appeared Norma Jean Collins and Patrick R. Collins, who acknowledged that they did sign the foregoing Separation Agreement, and that the same is their free act and deed.

Notary Public, State of Ohio

This instrument prepared by NIEBERDING & NIEBERDING
CO., L.P.A.

AGREEMENT

This Agreement by and between the stated parties made at Cincinnati, Ohio, on this 3rd day of September, 1976.

WITNESSETH:

That which each party agrees to undertake and perform according to the following terms and conditions, to-wit:

1 - PARTIES

The Parties to this Agreement are:

- A. Norma Jean Collins, as Norma Jean;
- B. Patrick R. Collins, as Patrick;
- C. J. R. Nieberding, as Trustee.

2 - PURPOSE

Pursuant to the provisions of Item 3. E. 3. of the Separation Agreement executed by Norma Jean and Patrick on July 27, 1976, Norma Jean and Patrick have executed and delivered general warranty deeds for the following real property:

Plat Book 612, page 200, parcels 77 & 158 consolidated, Deerfield Road; Plat Book 612, parcels 45, 46 & 61, Deerfield Road; Plat Book 612, page 200, parcels 196 & 197, Grooms Road; Plat Book 591, page 29, parcel 497, (Lot 133) Evangeline; Plat Book 600, page 24, parcel 41, Sycamore City Board of Education property; Plat Book 600, page 20, parcel 32, Bradbury property; Plat Book 612, page 170, parcels 66 & 67, (Lots 11 & 10 Crosley Farm); Plat Book 612, page 170, parcel 71, (Part Lot 4 Crosley Farm), Lot 1, Block 163, Re-Plat Eight, Lot 9, Block 383, Unit 11, Lot 4, Block 1159, Unit 41, Lot 8, Block 383, Unit 11, Lot 2, Block 163, Re-Plat Eight, Deltona Lakes, Florida; Lot 1, Block 18, Tract 2220, Lake Havasu, Arizona;

to J.R. Nieberding, Trustee, for the use and benefit of Patrick. This Agreement shall detail the obligations and responsibilities of the Trustee, his successors and assigns.

A. The Trustee shall hold the title to the real estate for the use and benefit of Patrick and to secure the payment of Alimony as provided in Item 7 B. C. & D. of the Separation Agreement, executed by Norma Jean and Patrick on July 27, 1976.

B. The duties and obligations of the Trustee herein shall terminate on the death of Norma Jean or Patrick, or as otherwise agreed upon by the parties.

C. The Trustee shall not sell or otherwise transfer or mortgage said real estate without the written consent of Norma Jean and Patrick.

D. The Trustee shall not have any responsibility or liability for the construction, maintenance, repair, use, occupancy, rental, taxes, assessments, insurance, mortgages, liens, or other encumbrances, incidental to, arising from, or otherwise relating to said real estate.

E. Patrick shall be responsible and liable for all expenses incurred by and on behalf of said Trustee in connection with said real estate.

F. In the event of the death or resignation of the Trustee, the parties hereto shall select and appoint a successor trustee.

G. The Trustee shall not be required to give bond.

H. The Trustee agrees to forward to Patrick any and all tax bills, insurance premium notices, and any and all papers or notices relating to or arising out of said real estate.

Norma Jean Collins

11a

Patrick R. Collins

J. R. Nieberding, Trustee

12a
**COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO**

IN THE MATTER OF

Norma Jean Collins
and
Patrick R. Collins,
Petitioner

MOTION TO MODIFY DECREE

Now comes Norma Jean Collins, by counsel, and respectfully moves the Court to modify the Decree entered herein and states that:

1. A Decree of Dissolution was made and entered in this action on the 8th day of September, 1976, based on the facts and circumstances then existing between the parties.

2. The Decree specifically provided for the division of property, both real and personal, and further ordered the payment of alimony ~~by~~ Patrick R. Collins to Norma Jean Collins as follows:

- A. \$15,000.00 lump sum payment;
- B. \$13,000.00 per year for and during the term of her natural life so long as she does not remarry;
- C. \$10,400.00 per year for and during the term of her natural life in the event she remarries;
- D. Annual cost of living adjustment;
- E. \$5,000.00 additional payment every third year on the anniversary date of the Decree, continuing for the term of her natural life.

3. That, at the time of the Decree, the parties were the joint owners of certain real estate which had been acquired and commercially developed during their marriage. In conjunction with the Decree herein, said real estate was conveyed by the parties in trust in lieu of partition and/or liquidation for the use and benefit of Patrick R. Collins and to secure the payment of alimony to Norma Jean Collins. There was no appraisal made of the real estate and in calculating the alimony the

parties mistakenly undervalued the real estate at \$1,500,000.00. A complete and thorough appraisal has since been made which reflects the true value of \$2,993,750.00 for said real estate.

4. The said Decree is a valid and subsisting judgment in full force and effect, unreserved and unmodified.

5. That Patrick R. Collins died testate on August 2, 1981, and his estate is being administered in the Probate Court of Hamilton County, Ohio, Case No. 813801. Under the terms of his last will and testament, he specifically authorized the Executrix to adjust, compromise and settle the alimony claim for Norma Jean Collins. The Executrix and Norma Jean Collins have been unable to reach a compromise and settlement of her alimony claim.

WHEREFORE, Norma Jean Collins respectfully moves the Court to determine her alimony claim in gross at \$1,496,875.00 and to modify the Decree accordingly.

Vernon W. McDaniel - M055
Attorney for Norma Jean Collins
830 Main Street
Cincinnati, Ohio 45202

CERTIFICATION

I hereby certify that a copy of the foregoing Motion to Modify Decree was served on Tara C. Trent, Executrix of the Estate of Patrick R. Collins, deceased, by regular U. S. Mail, and on Nieberding & Nieberding Co., L.P.A., Attorneys for the Estate of Patrick R. Collins, deceased, personally, this 19th day of April, 1982.

Vernon W. McDaniel

**COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
HAMILTON COUNTY, OHIO**

IN THE MATTER OF

**Norma Jean Collins
and
Patrick R. Collins,
Petitioner**

ENTRY MODIFYING DECREE

This cause came on for hearing before the Court on the 27th day of April, 1982, on the motion of Norma Jean Collins, one of the parties, to modify the Decree entered herein on the 8th day of September, 1976. At the hearing Norma Jean Collins was represented by counsel; the Executrix of the Estate of Patrick R. Collins, deceased, and the residual heirs of said estate, Tara C. Trent and Tamara L. Collins, were present in Court and represented by counsel.

The Court finds that it has jurisdiction of the parties and of the subject matter, and that said Decree is a valid and subsisting judgment, in full force and effect, unreserved and unmodified.

The Court further finds that at the time of the Decree the parties were the joint owners of certain real estate which was conveyed in trust to secure the payment of alimony to Norma Jean Collins; that the appraised value of said real estate is \$2,993,750.00 and that Norma Jean Collins is entitled to alimony based on said valuation; that Patrick R. Collins died testate on August 2, 1981, and that his estate is being administered in the Probate Court of Hamilton County, Ohio, Case No. 813801, and that prior to his death he made total alimony payments of \$84,647.00 pursuant to said Decree.

On consideration of the evidence, the record, and arguments of counsel, the Court finds said motion to be well taken and the same is hereby granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Decree of Dissolution entered herein on

September 8, 1976, be modified and that Norma Jean Collins be awarded the sum of \$1,496,875.00 as and for her alimony as of September 8, 1976, and it is further ordered that said total alimony award be reduced by the sum of \$84,647.00 previously paid.

Norma Jean Collins

Vernon W. McDaniel - M055
Attorney for Norma Jean Collins

Nieberding & Nieberding Co., L.P.A.
Attorney for Estate of Patrick R. Collins, dec'd.,
Tara C. Trent & Tamara L. Collins

By _____
J. R. Nieberding - N019

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

**TARA C. TRENT, Executrix of the Estate of
PATRICK R. COLLINS, Deceased,**

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant

**FINDINGS OF FACT
AND
CONCLUSION OF LAW**

PORTER, S.J.:

This is an action for refund of federal estate taxes assessed and paid in the amount of \$487,614.38 plus interest, costs and attorney fees (see Docs. 9, 16). Jurisdiction is based on 28 U.S.C. § 1346 (a) (1).

By agreement of the parties this case is submitted on what is contained in the files. This includes the complaint, answer, pretrial order and the parties' memoranda of law. (Docs. 11, 12, 13, 14), as well as the joint exhibits (Doc. 10). The final pretrial order contains an extensive stipulation of facts (Doc. 9). Also, at the request of the Court, the plaintiff submitted copies of deeds and mortgages which reflect the status of legal title to the various properties held by Patrick R. Collins and Norma Jean Collins as of the time of their divorce (Doc. 15).

The parties' stipulated facts are incorporated into the following findings of fact and conclusions of law made pursuant to Fed. R. Civ. P. 52.

FINDINGS OF FACT

1. This action was filed February 7, 1985. Jurisdiction is based on 28 U.S.C. § 1346 (a) (1).

2. Plaintiff, Tara C. Trent, is the Executrix of the Estate of Patrick R. Collins who died testate August 2, 1981. Ms. Trent is

a resident of the State of Ohio whose address is 9245 Gourmet Lane, Loveland, Ohio.

3. Defendant is the United States of America.

4. Patrick R. Collins, decedent, and Norma Jean Collins were married in Cincinnati, Ohio, December 23, 1952. A Decree of Dissolution of the marriage was entered September 8, 1976, in the Court of Common Pleas, Hamilton County, Ohio, Action No. A-7506128.

5. Two children were born of this marriage: Tara Carmel Trent, Plaintiff in this action in her capacity as Executrix of the Estate of Patrick R. Collins, and Tamara Lynn Collins.

6. On July 27, 1976, Patrick R. Collins and Norma Jean Collins entered into a Separation Agreement (Joint Ex. 1), subsequently incorporated into the September 8, 1976 Decree of Dissolution of Marriage, which provided for an equitable distribution of their property accumulated by them during their marriage (Joint Ex. 3).

7. The Separation Agreement provided at Item 3, paragraph B, Real Property, that all real estate owned by them other than the Deltona, Florida residence of Norma Jean and the Cincinnati, Ohio residence of Patrick, be transferred to a Trustee as mutually agreed upon (Joint Ex. 1).

8. By agreement dated September 3, 1976, Patrick and Norma Jean, pursuant to the provisions of Item 3. B. 3 of the July 27, 1976 Separation Agreement, executed and delivered general warranty deeds conveying to J.R. Nieberding, as Trustee, by legal description the real property which was jointly owned by them. See Stipulations.

9. The Separation Agreement further provided at Item 7, Alimony as follows:

(a) Patrick was to pay Norma Jean Fifteen Thousand Dollars (\$15,000.00) prior to entry of the Decree of Dissolution of Marriage.

(b) Patrick was to pay Norma Jean Thirteen Thousand Dollars (\$13,000.00) per year in equal monthly installments. In the event of her remarriage, Patrick was to pay

Norma Jean Ten Thousand Four Hundred (\$10,400.00) for life.

(c) The alimony payment was to be increased annually by a cost-of-living adjustment based on the Consumer Price Index as determined by the Bureau of Labor Statistics of the U.S. Department of Labor.

(d) Patrick was to pay Norma Jean Five Thousand Dollars (\$5,000.00) as additional alimony on every third (3rd) anniversary date of the Decree of Dissolution of the marriage.

10. On August 2, 1981 Mr. Collins died testate after having paid to his ex-wife a total of \$84,642.00 pursuant to the terms of the divorce decree.

11. The Last Will and Testament of Patrick R. Collins was duly admitted to probate in the Court of Common Pleas of Hamilton County, Ohio (Probate Court) on August 11, 1981.

See Stipulations.

12. The testator, Patrick R. Collins, provided in Item 7, page 4 of this Last Will and Testament:

"I hereby confer upon my Executrix full power and authority to adjust, compromise, and settle all claims against my estate, and in particular to adjust, compromise, and settle the alimony claim of my former wife, Norma Jean Collins, with the written consent of my daughters, Tara C. Trent and Tamara L. Collins, or the survivor of them, and Norma Jean Collins."

13. Mr. Collins' Last Will and Testament additionally contained the following regarding the Trust created in the Separation Agreement.

ITEM 2. At the time of making this, my Last Will and Testament, I am the owner of certain real estate which is held by my attorney, J.R. Nieberding, as Trustee, pursuant to the Separation Agreement executed on July 27, 1976, by and between my former wife Norma Jean Collins, and myself. Said Separation Agreement was incorporated into and became a part of the Decree of Dissolution

entered September 3, 1976, in Case No. A7606128 in the Court of Common Pleas. Division of Domestic Relations, Hamilton County, Ohio. Under the provision of Item 7 B, C and D of that Separation Agreement, I am obligated to pay alimony to Norma Jean Collins for and during the term of her natural life. Therefore, if Norma Jean Collins is living at the time of my death and does not consent to a full and complete settlement of her alimony claim, then in that event, I direct that all of said real estate held by J.R. Nieberding, as Trustee, or any successor Trustee, shall be transferred to the Trustee hereinafter named for the uses and benefits and for the term hereinafter specified.

* * * *

B. POWERS I hereby confer upon my said Trustee full power and authority to mortgage, improve, manage, maintain and lease all of said real estate during the term of this Trust. My Trustee shall have the power to sell or convey any or all of said real estate only with the written consent of Norma Jean Collins. My Trustee shall have the power to negotiate, compromise and otherwise settle the alimony claim of Norma Jean Collins during the term of the Trust with the written consent of Tara C. Trent and Tamara L. Collins and Norma Jean Collins, or if either of my named daughters shall predecease me or die during the term of the Trust, then with the written consent of the survivor of them and Norma Jean Collins.

C. USES AND BENEFITS After the payment of all expenses in connection with the management of the Trust Corpus, I hereby direct and authorize my Trustee to pay out of the income arising from said Trust, the alimony obligation to Norma Jean Collins, as provided in the Separation Agreement dated July 27, 1976, and any modifications thereto and to pay the residue of said Trust income in equal shares to my beloved daughters, Tara C. Trent and Tamara L. Collins.

* * * *

D. TERM The Trust created herein may be terminated during the lifetime of Norma Jean Collins with the written consent of my beloved daughters, Tara C. Trent and Tamara L. Collins, or the survivor, Norma Jean Collins and my Trustee. If not so terminated, the Trust created herein shall cease and terminate upon the death of Norma Jean Collins. Upon termination of the Trust, my Trustee shall transfer, convey and distribute the remaining Trust corpus and any undistributed income arising therefrom in accordance with the terms and provisions of Item 4 of this, my Last Will and Testament.

14. On May 7, 1982, upon Motion of Norma Jean Collins, a Decree was entered by the Court of Common Pleas, Hamilton County, Ohio, providing that the Decree of Dissolution entered on September 8, 1976, be modified and that Norma Jean Collins be awarded the lump sum of \$1,496,875.00 as and for alimony in gross as of September 8, 1976, and that such alimony award be reduced by the sum of \$84,647.00 previously paid (Joint Ex. VI). The United States was not a party to this proceeding.

15. The estate tax return (Ex. 5) was timely filed in April 1982, and reflected a debt due Norma Jean of \$1,412,228.00.

16. The Internal Revenue Service disallowed the deduction claimed, but allowed a deduction for \$273,190.00. This is the amount calculated by the I.R.S. to be the estate's alimony obligation at the time of death.

17. A statutory Notice of Deficiency was issued by the Internal Revenue Service at Cincinnati, Ohio on April 24, 1984, in which a deficiency in the estate tax was determined to be \$487,624.38.

18. The Estate of Patrick Collins paid the deficiency assessed on June 28, 1984. A claim for refund was filed July 17, 1984, and an official notice of disallowance was mailed to the plaintiff by the I.R.S. on December 21, 1984. This case was thereafter filed.

19. On December 23, 1986 plaintiff filed a supplement to her trial brief claiming an additional deduction from the gross estate of Patrick Collins of expenses incurred in prosecuting this claim for a refund, pursuant to 26 U.S.C. § 2053. (See Doc. 16.)

21a
CONCLUSIONS OF LAW

The legal questions in this case are framed by two controlling statutory provisions:

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Internal Revenue Code of 1954, 26 U.S.C. § 2033.

(a) General Rule. — For purposes of the tax imposed by Section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts —

- (1) for funeral expenses,
- (2) for administration expenses,
- (3) for claims against the estate, and
- (4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,

as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

Id., § 2053.

Plaintiff argues that the commissioner's decision to disallow as a deduction from the gross estate of Patrick Collins \$1,412,228 pursuant to the modification of a divorce decree is incorrect for either of two reasons. First, the amount deducted represents the value of the property in the Collins Trust owned by Norma Jean and therefore not properly included in the gross estate of Patrick Collins pursuant to § 2033. Alternatively, plaintiff argues that the amount deducted constitutes a settlement of Norma Jean's claim against the estate for alimony, and is therefore a debt deductible from the gross estate pursuant to § 2053.

Plaintiff's first proposition is problematic, principally because the estate tax return does not list any property as being held jointly by Norma Jean and Patrick, except a lot in Arizona worth \$3,000. However, we need not dwell on this issue because

we conclude, for reasons discussed below, that the state court judgment modifying the consent decree did establish a viable debt for estate tax purposes, but a higher state court would hold it was mistaken as to the amount. The government argues that the deduction did not represent a bona fide debt for several reasons.

First, the government cites *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929), for the proposition that claims against the estate, deductible under Section 2053, must be ascertained as of the date of the decedent's death without regard to subsequent events. Norma Jean's claim, the government contends, is limited by the separation agreement incorporated in her divorce decree. As of the date of Mr. Collins' death, the present value of this claim was estimated by the government to be \$273,190.00.

This argument is unpersuasive. The plaintiff does not claim a deduction based upon facts which came into existence after the decedent's death, as was the case in *Ithaca Trust*. Rather, plaintiff contends that because she believed Norma Jean had an enforceable claim for alimony in gross against the estate for \$1,412,228.00, the estate was entitled to the Section 2053 deduction. The terms of the Last Will and Testament of Patrick Collins clearly established the power and authority of the executrix to settle all claims against the estate, in particular the alimony claim of Norma Jean Collins. (See Finding # 12.) The debt to Norma Jean existed therefore, if it existed at all, at the time of death. Apart from invoking *Ithaca Trust*, The government's argument merely goes to the calculation of the debt, not to when the debt arose. The government's first contention therefore must fail.

The government next contends Norma Jean's claim against the estate is not bona fide as not being based on adequate consideration. See *Commissioner v. State Street Trust*, 128 F.2d 618 (1st Cir. 1942); *Jacobs v. Commissioner*, 34 F.2d 223 (8th Cir. 1929). See also 26 U.S.C. § 2053 (c) (requiring claims against the estate to be contracted bona fide and for an adequate consideration).

Since we determine below that the state court erred in the amount awarded to Norma Jean as alimony in gross, we need not dwell on the government's second contention except to

agree with the government that the compromise of Norma Jean's claim for alimony was not supported by adequate consideration, especially in light of the fact that she never transferred any interest she might have in the properties to the state by quitclaim deed or otherwise once she obtained the award of alimony in gross. *See infra*.

The government, citing *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), next contends that the state court judgment modifying the divorce decree not be construed to affect the estate's tax liability, as a decree of a state trial court is not binding for federal estate tax purposes.

It is true, as the government argues, that the Supreme Court in *Estate of Bosch* held that federal authorities are not bound by a state court's characterization of a property interest unless the ruling is from the highest court in the state. However, we cannot accept the government's apparent propositions that where the Supreme Court of a state has not spoken the government is left free to interpret the property interest in any manner it chooses. The Court in *Bosch* did not adopt this view. Rather, the Court, citing the Rules of Decision Act, 28 U.S.C. § 1652, and applying the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), adopted the following principle:

This is not a diversity case but the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the state's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the state court. In this respect, it may be said to be sitting as a state court. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956).

Bosch, supra, at 465.

Thus, if the common pleas judgment awarding Norma Jean Collins alimony in gross in the amount of \$412,228.00 is an accurate expression of state law, it is binding on this court for federal tax purposes. Moreover, the decision of the state court need not be adversarial, as the government contends, in order to be binding. The question is whether the plaintiff's pecuniary

interest in the estate is the result of state law, correctly interpreted. *Ahmanson Foundation v. United States*, 674 F.2d 761, 774 (9th Cir. 1981); *Farley v. United States*, 581 F.2d 821, 829 (Ct. Cl. 1978); see also Commissioner's Regulations 20.2053-1 (b) (2).

The state court judgment clearly created an obligation on the part of the estate in favor of Norma Jean Collins (Finding #19). In order to determine whether the obligation is binding on the government for federal tax purposes, we must predict how the Ohio Supreme Court would decide if it were confronted with the case. See *Estate of Bosch*, *supra*.

Our starting point is the terms of the state court order modifying the divorce decree and awarding Norma Jean \$1,496,875.00 as alimony, reduced by the sum of \$84,647.00 previously paid. The order reads in pertinent part as follows:

The Court . . . finds that at the time of the Decree the parties were the joint owners of certain real estate which was conveyed in trust to secure the payment of alimony to Norma Jean Collins; that the appraised value of said real estate is \$2,993,750.00 and that Norma Jean Collins is entitled to alimony based on said valuation; that Patrick R. Collins died testate on August 2, 1981, and that his estate is being administered in the Probate Court of Hamilton County, Ohio, Case No. 813801, and that prior to his death he had made total alimony payments of \$84,647.00 pursuant to said Decree.

On consideration of the evidence, the record, and arguments of counsel, the Court finds [the motion of Norma Jean Collins to modify the Decree] to be well taken and the same is hereby granted.

As an initial matter, it is clear under Ohio law that the common pleas court retains jurisdiction to modify an alimony award when the award is for sustenance and support. *Cherry v. Cherry*, 66 Ohio St.2d 348 (1981); *Wolfe v. Wolfe*, 46 Ohio St. 2d 399 (1969). The parties do not contest the jurisdiction of the common pleas court to enter the alimony modification. (See Government Brief at 10.) In reaching its decision, the court must consider the factors enumerated in Ohio Rev. Code

§ 3105.18 and all other relevant factors, and decree a sum payable in gross as the court deems equitable. *Cherry, supra* at syllabus ¶ 1. The lower court's modification will be reversed only for an abuse of discretion. *See Cherry, supra*.

The plaintiff contends that the parties placed the property in a trust to avoid the necessity of a participation upon divorce, which was thought would seriously affect its value (See Deposition of Tara Trent at 10). There is no evidence that Norma Jean intended to transfer her half interest in the property to Patrick, in fact, she always considered herself a one-half owner of the property (Deposition of Norma Jean Collins at 19-20). Likewise, it was the understanding of daughter Tamara Lynn Collins that "everything was Mom and Dad's" (See Deposition of Tamara Lynn Collins at 13).

It is true that the terms of the trust state that the trustee would hold the property "for the use and benefit of Patrick." However, we agree with plaintiff that this phrase is simply technical language that denotes the creation of a trust, and does not provide indication of where the property is to go upon the termination of the trust. *See Homer v. Wallenweber*, 89 Ohio App. 255, 260 (Hamilton County Court of Appeals 1951); see also 1 Scott on Trusts, 306-307.¹ In any event, Ohio law recognizes that:

. . . the provision for alimony is an allowance. It is in the nature of a partition. Recognizing the right of the wife to participate in the accumulations which are presumably the result of their joint efforts and joint economies, and having in mind at the same time any property which may have come to the husband by the marriage, the law wisely awards the wife a just and equitable proportion of the whole. . .

¹ Additionally, the parties stipulated that the properties originally transferred to the trust were jointly owned by them. See Finding 8. When a trust is ended by means of power of termination vested by the settlor in the beneficiaries, as it was here, the trustee holds the principal of the trust for the settlor or his successors if he is dead. *See Lillard v. Lillard*, 63 Ohio App. 403 (Hamilton County Court of Appeals 1939); Bogert, Trust and Trustees § 1010 (1983). Norma Jean, as joint owner of the properties transferred to the trustee is a settlor and therefore is entitled to her share of the trust. *Colonial Trust Co. v. Commissioner of Internal Revenue*, 111 F.2d 740 (2d Cir. 1940).

State, ex rel Cook v. Cook, 66 Ohio St. 566, 573 (1902); see also *Cherry, supra*; *Wolfe, supra*. Thus, it is of no consequence whether Norma Jean technically relinquished her interest in the trust property since Ohio law recognizes her interest in the property, on the basis of her rights as the former spouse of Patrick Collins.

However, simply finding that Norma Jean has an interest in the property does not end our inquiry. The Ohio Supreme Court has made it clear that there is no presumption that marital property be divided equally upon divorce, and for a court to do so without considering all relevant factors is an abuse of discretion. *Cherry, supra* at 356. Moreover, the former spouse is entitled to no more than her equitable share in the property. See *Cook, supra*.

We therefore cannot agree that the Ohio Supreme Court would order alimony in gross in the amount of one-half the appraised value of the property held in trust by J.R. Nieberding, and thus cannot conclude that the state court judgment is binding on this court for estate tax purposes. Clearly, if Norma Jean is entitled to a sum equal to her equitable share in the property, she is entitled to one-half the equity in those properties, or, in other words, one-half the appraised value of the properties minus the value of the mortgages thereon, reduced by the amount of alimony already paid, which is \$84,647.00.

We also believe that a higher state court would have required Norma Jean to transfer by quitclaim deed her interest in the estate, to ensure that she relinquished any interest in the property. As matters appear to stand now, Norma Jean could still assert a one-half interest in the property, despite having been awarded alimony in gross in the amount of one-half its total appraised value. In fact, one of plaintiff's contentions before this Court is that Norma Jean continues to own a one-half interest in the property. *See supra*.

Order

For these reasons we conclude that the state court judgment awarding alimony in gross to Norma Jean Collins created a viable debt for federal estate tax purposes, but that a higher court would have disagreed with the amount awarded. We therefore conclude that Norma Jean was entitled to alimony in gross based on her one-half interest in the *equity* of the property held in trust by J.R. Nieberding, minus the amount of alimony already paid, which is \$84,647.00.² Plaintiff will therefore be entitled to a tax refund that is calculated on the basis of the above formula, plus interest.

² The estate tax return, exhibit V, shows the appraised value of the property held by the estate of Patrick Collins to be \$3,363,163.00 and the amount of the mortgages thereon to be \$1,830,182.44. However, not all the properties in the estate were included in the transfer to the trust, and hence were not involved in the division of property by the Court of Common Pleas. The reported value of the properties transferred to the trustee was \$2,993,750.00. The total amount of mortgages on these properties was \$886,058.00. Letter from plaintiff to Court dated November 20, 1986 (Doc. 15).

Also, plaintiff has filed a claim for a supplemental deduction from the gross estate of Patrick Collins for expenses incurred in prosecuting this claim for refund. This is unopposed, but we do not know the final amount claimed. Because there is an insufficient basis upon which to enter final judgment, the parties are hereby instructed to file proposed judgment entries and accompanying supporting memoranda within ten days of this order.

SO ORDERED.

United States Senior District Judge

**JUDGE'S CHAMBERS
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
823 POST OFFICE BUILDING
CINCINNATI, OHIO 45202**

David S. Porter
Senior Judge

February 16, 1988

Burgess L. Doan, Esq.
Walker, Chatfield & Doan
1900 Carew Tower
Cincinnati, Ohio 45202

Thomas R. Jones, Esq.
Attorney, Tax Division
Department of Justice
P.O. Box 55
Ben Franklin Station
Washington, DC 20044

Re: Tara C. Trent, Executrix of the Estate of Patrick R.
Collins, Deceased
Civil Action No. C-1-85-0395

Gentlemen:

I have been studying our decision in this case, Mr. Doan's letter of June 4, 1987, Mr. Jones' submission of an order for judgment and memorandum in support (submitted by letter of June 9, 1987), Mr. Doan's letter of June 15, 1987, the transcript of our conference July 23, 1987, defendant's memorandum regarding entry of judgment and plaintiff's memorandum in opposition (doc. 28). The transcript and memoranda are documents of record. I think the letters should also be made part of the record, i.e., ordered filed with the other papers. I think we should also have an agreement (if we don't already) that the record was supplemented by the furnishing of the deeds and mortgages attached to Mr. Doan's letter of November 20, 1986 (doc. 15).

Mr. Brown, upon reviewing the Court's order, concluded first that footnote 2 on the last page of our memorandum and

order was not a finding. There, we said the total amount of mortgages on the properties is \$886,058 and our authority for that was a letter from counsel (doc. 15). On checking, we find the balances listed there were on dates from 1970 to 1975. One was even 1964. As Mr. Doan pointed out (tr. 17, line 16-18), our opinion would have charged Norma Jean Collins essentially one-half of the outstanding liabilities *as of the date of the divorce*. Mr. Brown thought that the balance should be as of the date of death as shown on the return (tr. 18, line 2). On reflection, I agree with Brown, and, in effect, amend footnote 2 on the last page of the memorandum and order so that the figure for mortgages and liens outstanding be determined by the balances as of the date of Patrick's death. The government says this is \$1,671,420.77 (doc. 27, p. 2). According to the government, this number excludes mortgages and liens on property not in the trust, but does include mortgages and liens on the property after the divorce in September 1976. *Id.* I agree with the government, but must have a statement showing the government's computations so I can check them against the Estate Tax Return.

The government should submit another proposed order of judgment showing the value of the property (half the value of the property held in trust) reduced by the amount of mortgage indebtedness as of the date of death. It should show the Court on its own amends footnote 2 on the last page of its memorandum and order to agree with the government's position, if the computation enables the Court to check on the correctness of the figure of \$1,671,420.77 as the balance of mortgages and liens outstanding at the date of death of Patrick.

I figure a higher Ohio court would have limited Norma Jean's "alimony" to her half interest in the equity of the property that reverted to her on the termination of the trust.

The order of judgment should include a credit for state death taxes in the amount of \$60,147.30. (See memo attached to the June 9 letter.) It should be adjusted in view of the declaration of the executor's commission and attorney fees which I think is in the amount of \$70,000. *Id.*, p. 3. The order should also provide that the IRS will abate the assessed interest in accordance with the decision. *Id.*, p. 3.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

TARA C. TRENT, Executrix of the Estate of
PATRICK R. COLLINS, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT ENTRY

This matter, having been submitted to the court upon fully stipulated facts, the Court hereby makes the following additional findings and amendments to its opinion of March 25, 1987.

1. It shall be ordered as filed with the Court and made a part of the record the following documents: Mr. Burgess Doan's letter of November 20, 1986 (Doc. 15) furnishing deeds and mortgages as requested by the Court; Mr. Burgess Doan's letter of June 4, 1987 (to Aubrey C. Brown, IRS); Mr. Burgess Doan's letter of June 15, 1987 (to Judge David S. Porter); Mr. Jones memoranda in Opposition (Doc. 28); Judge Porter's letter of February 16, 1988; Mr. Jones letters of March 18, April 25 and May 11, 1988; Mr. Martin's letter of May 20, 1988 (to Thomas R. Jones); and transcripts of telephone conferences held by the Court July 23, 1987 and June 2, 1988; and all enclosures therewith.

2. Upon its own Motion the court amends footnote 2 of the last page of its March 25, 1987 Memorandum to show that the total mortgages and liens outstanding at the date of Patrick's death was \$1,651,416.28.

3. The Estate is entitled to a deduction for additional attorney fees of \$70,000 as reported on Declaration (U.S. Treasury Form 4421), and recomputed interest on Federal and State of Ohio Estate tax liabilities as determined and agreed through inter-related computations prescribed by the Internal Revenue Code.

Plaintiff has requested leave to file corrected and updated computations giving in effect the current accruals of interest liabilities due to the lapse of time and such other items to which plaintiff may be entitled (doc. 28, p. 8). Such correction and updated computations should be furnished promptly so they may be taken into account by Mr. Jones in drafting another proposed judgment entry. Ten days from the date of this letter are allowed for that purpose.

I have not overlooked the fact that the taxpayer has urged the Court to re-examine the items taken into consideration in reaching our decision as compared to the items taken into consideration by the Court of Common Pleas in reaching its decision. We conclude that a higher Ohio court would not allow "alimony" in more than the half the amount of Norma Jean's equity in the property that was in the trust as of the date of Patrick's death and the resultant termination of said trust. The amount the Common Pleas Court found to be the debt was suspect because it would have eliminated the payment of any estate tax, *i.e.*, it gave force to the argument of the government that the whole proceeding was post-death estate planning. We think it highly probable that if Patrick were alive and there had been a motion to modify the divorce decree there would not have been any such result.

I appreciate your cooperation in this difficult matter. Hopefully, we can get it to a conclusion so that any aggrieved party can pursue appropriate remedies. Thank you.

Sincerely yours,

David S. Porter

DSP/ap

cc: Nicholas Pantel, AUSA

4. The Internal Revenue Service is directed to abate the assessed interest in accordance with this decision.

In accordance with the above and the Court's prior opinion as so modified it is hereby **ORDERED** that judgment be entered in favor of the plaintiff and against the defendant in the amount of a \$288,306.15 refund of federal estate taxes plus interest from June 26, 1984 as provided by law.

David S. Porter
Senior United States District Judge

34a
**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

TARA C. TRENT, Executrix of the Estate of
PATRICK R. COLLINS, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

**MEMORANDUM
AND
ORDER**

PORTER, S.J.:

This case is before the Court on the United States' motion to supplement the findings of fact and conclusions of law (Doc. 20). The plaintiff has responded (Doc. 21).

We have reconsidered our order in light of the government's motion and have concluded that the motion is not well-taken and must be denied. Only a couple of points require comment.

First, the government's memorandum completely overlooks that the will of Patrick R. Collins contained authority in the Executrix to compromise all claims, especially the alimony claim. Also, we remain unconvinced that Norma Jean was not half-owner of the property in the trust. We find wholly unpersuasive the language the government cites from the will indicating Patrick Collins *believed* he owned all the property in the trust (Doc. 20 & 7). Collins' belief is uncontrolling on the legal question of Norma Jean's interest in the property. Certainly, as we mentioned in our first order, no one would buy any of the properties without requiring a deed from Norma Jean. In any event, Norma Jean did have some leverage to compromise her claim, at least to the extent of one-half the equity of the property.

We are mindful of the government's contention that we misconstrued stipulation 7 that stated that Patrick and Norma

Jean conveyed to the trustee real property which was jointly owned by them, insofar as Norma Jean does not appear as a title holder of at least two properties contained in the trust.

However, as we stated in our order, we believe Ohio law recognizes that Norma Jean, as an ex-spouse, has an equitable interest in all property that came to the couple during their marriage, whether or not her name appears on the deed.

Order

Therefore, on the basis of the foregoing, as well as our previous order, we deny that defendant's motion to reopen the case, and order the government to file a proposed judgment entry and supporting memorandum within ten days of this order.

SO ORDERED.

United States Senior District Judge

36a
**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

TARA C. TRENT, Executrix of the Estate of
PATRICK R. COLLINS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

PORTER, S.J.:

Pursuant to the Court's letter of February 16, 1988 to counsel (attachment to document 29) the following letters attached hereto are, by agreement of counsel, made a part of the record because they were part of the discussion leading up to the amendment of the Court's Findings of Fact and Conclusions of Law: letter of June 4, 1987 from Burgess L. Doan to Aubrey C. Brown; letter of June 9, 1987 from D. Patrick Mullarkay to the Court dated June 9, 1987 enclosing an order for judgment and memorandum in support of defendant's proposed judgment entry; letter from Burgess L. Doan to the Court dated June 15, 1987.

SO ORDERED.

United States Senior District Judge

37a
**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

TARA C. TRENT, Executrix of the Estate of
PATRICK R. COLLINS, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

ORDER

PORTER, S.J.:

Never has this Court had more trouble getting judgment in accordance with a decision. That is because certain parts of the decision have been called into serious question.

The parts are not only footnote 2 on page 16 of the Court's Findings of Fact and Conclusions of Law (Doc. 18) but statements at page 15 and 16 of the Court's Findings of Fact and Conclusions of Law where it is stated that Norma Jean "is entitled to one-half the equity in those properties, or, in other words, one-half the appraised value of the properties minus the value of the mortgages thereon, *reduced by the amount of alimony already paid, which is \$84,647.00.*" (Underscoring supplied.)

We have come down to the point where the parties have each submitted judgment entries. The only difference between the two is whether the taxable estate should be increased or decreased by this figure of \$84,647.00 (Doc. 29, pages 7 and 15, lines 4-5).

The pertinent documents in addition to the Findings of Fact and Conclusions of Law (Doc. 18) are those referred to in paragraph 1 of the Court's letter to counsel dated February 16, 1988, an attachment to document 29 and the correspondence that followed which is also attached to document 29 or the Order of June 8, 1988 (Doc. 31), as well as the letter from counsel for the plaintiff dated June 3, 1988 (Doc. 32).

After consideration I am persuaded to the plaintiff's point of view and this is reflected in my letter to counsel dated February 16, 1988 (attached to Doc. 29). We therefore amend our Findings (Doc. 18, pages 15 and 16) by concluding that Norma Jean is entitled to a sum equal to her equitable share in the property, *i.e.* the appraised value of the properties at date of death, minus the value of the mortgages thereon.

Accordingly, we are this day signing the proposed judgment entry submitted by the plaintiff.

SO ORDERED.

United States Senior District Judge

Nos. 83-3740/88-3778

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TARA C. TRENT, Executrix of
the Estate of PATRICK R.

COLLINS, Deceased,

Plaintiff-Appellee,

Cross-Appellant,

v.

On Appeal from the
United States District
Court for the Southern
District of Ohio

UNITED STATES OF AMERICA,

Defendant-Appellant,

Cross-Appellee.

Decided and Filed January 11, 1990

Before: MERRITT, Chief Judge; NELSON, Circuit Judge;
and BROWN, Senior Circuit Judge.

BROWN, Senior Circuit Judge, delivered the opinion of the court in which MERRITT, Circuit Judge, joined. NELSON, Circuit Judge, (pp. 14-20) delivered a separate dissenting opinion.

BAILEY BROWN, Senior Circuit Judge. Tara Collins Trent, executrix of the estate of Patrick R. Collins, who died in 1981, seeks a refund of \$487,614.38 of federal estate taxes plus interest, which she contends was erroneously assessed and collected by the Internal Revenue Service. It is the contention of the executrix that the net taxable estate is less than is contended by the government because the estate is entitled to a larger alimony deduction than was allowed, or, alternatively, because it is entitled to exclude from the gross estate the interest of the former wife of the deceased in certain real estate. The executrix sued in the district court for the Southern District of Ohio and was partially successful there; the district court, concluding that the estate was entitled to a larger alimony deduction than

was allowed (though not as large as that claimed), granted her a refund judgment of \$288,306.15 plus interest. Both the government and the executrix appealed. We conclude that the district court was in error in granting any relief to the executrix, and therefore we reverse and remand to the district court with instruction to dismiss this action with prejudice.

I

A.

Patrick and his wife, Norma Jean Collins, who had been married since 1952, determined to dissolve their marriage. Represented by the same attorney, J. R. Nieberding, they obtained a decree of dissolution in the Common Pleas Court of Hamilton County, Ohio, on September 8, 1976; the decree incorporated a separation agreement, prepared by their attorney, dated July 27, 1976.

The separation agreement state that the parties "mutually expressed a desire to settle and adjust all matters relating to their mutual property rights to which either might be entitled in the event of dissolution," stated that the separation agreement would be included in their petition for dissolution and, if granted, in the decree of dissolution of the marriage, and further stated that it was their intention "to make an equitable distribution of their property and to settle all claims thereunder."

The separation agreement provided for division of tangible personal property such as automobiles, motorcycles, furniture and furnishings, and for savings and checking accounts. It also provided that Patrick was to retain all of the stock in P. R. Collins Plumbing Co. and retain ownership of life insurance policies. With respect to real estate, Norma Jean received their home in Florida and Patrick received their home in Ohio. Of particular significance in this case was a provision that: "All other real estate now owned by the parties hereto, either individually or jointly, shall be transferred of record, to a trustee mutually agreed upon by the parties hereto for the use and benefit of Patrick."¹ Patrick assumed and agreed to pay all

¹It is Norma Jean's claimed retained interest in this property that, the executrix contends, should not have been included in the gross taxable estate.

of their outstanding debts including mortgages on his real estate to be placed in trust. With respect to alimony, Patrick agreed to pay Norma Jean \$15,000.00 prior to entry of the decree and agreed to pay \$13,000.00 per year in equal monthly installments unless she remarried, which case this amount would be reduced to \$10,400.00 per year, with adjustments based on the Consumer Price Index. Patrick also agreed to pay Norma Jean an additional \$5000.00 every third year. Patrick received custody of their minor daughter, Tamara Lynn Collins; the other daughter, Tara C. Trent, who is executrix of the estate and plaintiff herein, was an adult. There was no provision for subsequent modification of the agreement.

After the execution of the separation agreement but prior to obtaining the dissolution decree, Patrick, Norma Jean and their attorney, Nieberding, as trustee, executed on September 3, 1976, the trust agreement contemplated by the separation agreement. The trust agreement recites that, pursuant to the separation agreement, Patrick and Norma Jean had executed and delivered to Nieberding, as trustee, "for the use and benefit of Patrick," general warranty deeds covering the real estate that is specifically described in the trust agreement. The trust agreement further provides that the trustee would hold title to this real estate "for the use and benefit of Patrick" and to secure payment of alimony as such is provided in the separation agreement. It still further provides that Patrick would be responsible for all debts and liabilities in connection with the real estate, that the trustee could not sell or mortgage the property without the consent of Patrick and Norma Jean and that the duties and obligations of the trustee would terminate with the death of Patrick or Norma Jean or by their agreement.

With Mr. Nieberding representing both parties, Patrick and Norma Jean obtained a dissolution of marriage decree on September 8, 1976, the separation agreement was adopted by the decree, and the parties were ordered to comply with the agreement.

After the entry of the decree, to wit on November 18, 1976, Patrick executed a will prepared by Mr. Nieberding. In term 2 of the will, it is stated:

At the time of making this, my Last Will and Testament, I am the owner of certain real estate which is held by my attorney J. R. Nieberding, as Trustee, pursuant to the Separation Agreement executed on July 27, 1976, by and between my former wife, Norma Jean Collins, and myself . . . Under the provision of Item 7 B, C and D of that Separation Agreement, I am obligated to pay alimony to Norma Jean Collins for and during the term of her natural life. Therefore, if Norma Jean Collins is living at the time of my death and does not consent to a full and complete settlement of her alimony claim, then in that event, I direct all of said real estate held by J. R. Nieberding, as Trustee, or any successor Trustee, shall be transferred to the Trustee hereinafter named for the uses and benefits and for the term hereinafter specified.

The will further provides that Patrick's daughter, Tara C. Trent, would succeed Nieberding as trustee. It empowers this trustee to sell trust property but only with the consent of Norma Jean. It further authorizes her, as trustee, to settle the alimony claim of her mother, Norma Jean, and also authorizes her to make the alimony payments to Norma Jean from the income of the trust with the balance of the income to be divided equally between the trustee, Tara C. Trent, and her sister, Tamara L. Collins. The will also provides that, upon the death of Norma Jean, the trust would terminate and the trust property was bequeathed to Tara C. Trent and to Tamara L. Collins.

B.

After Patrick died in 1981 and his will admitted to probate, Norma Jean moved in common pleas court to modify the alimony provision in the dissolution decree. The two daughters did not oppose the motion and the government was not notified. The court thereupon, on April 27, 1982, entered a "modifying decree" in which the court found that at the time of the dissolution decree Patrick and Norma Jean were joint owners of the real estate that they had conveyed to Nieberding a trustee and that the "appraised value of said real estate is \$2,993,750.00 and that Norma Jean Collins is entitled to alimony based on said valuation." The court further found that, prior to his death, Patrick had made alimony payments of

\$84,647.00 to the decree. The court thereupon modified the dissolution decree by awarding Norma Jean "the sum of \$1,496,875.00 as and for her alimony as of September 8, 1976" less \$84,647.00 that had been paid to her under the separation agreement, or a net amount of \$1,412,228.00. In short, the court awarded Norma Jean alimony in gross in an amount equal to one-half the claimed value of real estate in the trust (without respect to mortgages), less the amount of alimony that had been paid to her.

Then, on April 30, 1982, the estate, by Nieberding, filed an estate tax return for Patrick's estate. The estate claimed a deduction for alimony owed to Norma Jean in the amount of \$, 12,228.00. The estate did not, however, claim in the return that the real estate that had been conveyed to Nieberding as a trustee had been jointly owned by Norma Jean and Patrick after they had placed the property in trust. In other words, the return did not show this property as being jointly owned by Patrick's estate and Norma Jean; it reflected that all of this property had been owned by Patrick at his death. In fact, the only jointly owned real property included in the return was property in Arizona valued at \$3000.00.

The Internal Revenue Service determined that the estate was not entitled to an alimony deduction in an amount, as claimed, of \$1,412,228.00. Instead, it determined that the estate was entitled to an alimony deduction of \$273,190.00, which is the actuarial value of the alimony payments to be made to Norma Jean under the separation agreement following Patrick's death.² Therefore, a deficiency of \$487,624.38 was determined; the estate paid the deficiency and sued for a refund in the district court.

II

A.

In her complaint filed in district court, the executrix alleged that her mother, Norma Jean, had continued to own a half-interest in the property conveyed by her and Patrick to the trust and that: "In order to avoid partition of the property, the

²The estate does not contest this computation of actuarial value.

Trustee sought to have the Court of Common Pleas determine the interest of Norma Jean Collins in the property and requested that the Court award her a sum certain in lieu of partitioning the property." The complaint further alleges that the common pleas court determined that Norma Jean "was entitled to the sum of \$1,496,875.00 in lieu of her interest in the property less payments previously made of \$84,647.00." The complaint further alleges that the Internal Revenue Service erred in disallowing a claim against the estate of \$1,139,038.00 to the extent that it exceeded \$273,190.00 (the actuarial value of the periodic payments). Thus the theory of the complaint is that, while Norma Jean had actually owned a half-interest in the real estate in the trust at the time of Patrick's death, this was the basis for the modification of the dissolution decree allowing Norma Jean lump sum alimony in the amount of \$1,139,038.00. Therefore, consistent with the estate tax return, the complaint actually sought a refund by increasing the alimony deduction allowed as a claim against the estate under 28 U.S.C. § 2053(a) (3), not by a decrease in the gross estate as such is defined in 26 U.S.C. § 2033.

The case was tried in the district court on "what is contained in the files," including complaint, answer, pretrial orders, memoranda of law, exhibits, stipulations and depositions.

Contrary to the precise theory of the complaint, the estate really presented a double-barreled attack to the district court. The opinion of the district court states:

Plaintiff argues that the commissioner's decision to disallow as a deduction from the gross estate of Patrick Collins \$1,412,228 pursuant to the modification of a divorce decree is incorrect for either of two reasons. First, the amount deducted represents the value of the property in the Collins Trust owned by Norma Jean and therefore not properly included in the gross estate of Patrick Collins pursuant to § 2033. Alternatively, plaintiff argues that the amount deducted constitutes a settlement of Norma Jean's claim against the estate for alimony, and is therefore a debt deductible from the gross estate pursuant to § 2053.

The district court expressed doubt as to the validity of the

Plaintiff's first proposition is problematic, principally because the estate tax return does not list any property as being held jointly by Norma Jean and Patrick, except a lot in Arizona worth \$3000.00. However, we need not dwell on this issue because we conclude for reasons discussed below, that the state court judgment modifying the consent decree did establish a viable debt for estate tax purposes, but a higher state court would hold it was mistaken as to the amount.

The district court determined that, contrary to the government's contention, the state court decree, modifying the dissolution decree, created a valid debt because the executrix was authorized to settle her mother's alimony claim and because she believed that her mother had an "enforceable claim for alimony in gross for \$1,412,228.00."³ The district court then determined that the state court's modifying decree was in accord with state law except that the amount of the alimony deduction claimed should be reduced by an amount equal to one-half the outstanding mortgages on the involved real estate; that is, that Norma Jean's interest that was the basis of the increased alimony claim was limited to her "equity" in the real estate trust.⁴

In determining that, under Ohio law, the grant of the alimony in gross by the state court was proper, the district court relied on the proposition that Norma Jean, at the time of Patrick's death, owned a one-half interest in the real estate in the trust. In concluding that Norma Jean had such a retained interest, the court in part relied on the proposition that this was the intention of Norma Jean and Patrick. But the district court's opinion also concluded: "Thus, it is of no consequence whether Norma Jean technicall [legally?] relinquished her interest in the trust property since Ohio law recognizes her interest in the property, on the basis of her rights as the former

³Inexplicably, however, while the district court apparently recognized that Norma Jean's claim, to be deductible as a valid debt, must be supported by adequate consideration, it determined that it was not so supported because Norma Jean had never executed a deed conveying her claimed interest in the trust property to the executrix.

⁴This decrease in the alimony deduction by the district court is the basis of the estate's

spouse of Patrick Collins." Thus, the district court actually determined that the award of the alimony in gross by the modification decree was in accord with Ohio law because, whether or not Norma Jean and Patrick had intended that she retain her interest in the real estate in trust, under Ohio law Norma Jean had such an interest "on the basis of her rights as the former spouse of Patrick Collins."⁵

The district court also held that the common pleas court retained jurisdiction to modify the alimony award.

The opinion of the district court concludes by holding that "the state court judgment awarding alimony in gross to Norma Jean Collins created a viable debt for federal estate tax purposes," but that the debt should be reduced because of the mortgages on the trust property.

Accordingly, while the opinion of the district court is not a model of clarity, it is completely clear that its holding is that the estate is entitled to an estate tax deduction based on the decree of the common pleas court in 1982, modifying its former decree of 1976. It determined that the modified decree created a valid indebtedness of the estate, reduced, however, by one-half the mortgages on the property.

III

As has been stated, on appeal the estate claims that it is entitled to a refund of estate taxes because it is entitled to a deduction of a debt created by the grant of alimony in gross by modifying decree of the common pleas court or, alternatively, because Norma Jean Collins owned, at the time of Patrick's death, a one-half interest in the realty that had been placed in trust and this interest must therefore be excluded from the gross estate.

A.

The government contends that there are several reasons why the modified alimony decree did not create a deductible debt, citing *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929) (the modified decree is a post-death event and therefore irrelevant) and *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967) (the modified decree was not grounded on an enforceable right under state law).

⁵Nevertheless, the estate does not contend on appeal that Norma Jean would have had, "as the former spouse," a continuing interest in this real estate if she had effectively conveyed her interest when the trust was created.

We conclude, however, that we need not resolve those contentions because the government is clearly right in its contention that the modified alimony decree was itself void under Ohio law. It was void because the common pleas court, under that law, was without jurisdiction to render the decree.

The Ohio Supreme Court decided just this question in *McClain v. McClain*, 15 Ohio St. 3d 289, 473 N.E.2d 811 (Ohio 1984).

McClain distinguished between a decree of marital dissolution, in which the parties negotiate the amount of alimony, and divorce, in which the court decrees it. See Ohio Rev.CodeAnn. § 3105.63 (1989). Because marital dissolution requires the parties' consent, and because the terms of alimony payments may involve very delicate compromise, it follows that the court may not modify those terms. The statutory history, as the Ohio court pointed out, supports this interpretation. As enacted, § 3105.65(B) of the Ohio Code read, in pertinent part: "(B) *** The court has full power to enforce its decree, and retains jurisdiction to modify all matters of custody, child support, visitation, and periodic alimony payments." 135 Ohio Laws, Part II, 603, 616, (emphasis added). However, in 1975, one year before the Collins' marriage was dissolved, the legislature deleted the final clause referring to periodic alimony payments. The *McClain* court believed this modification deprived Ohio courts of jurisdiction to modify the amount of alimony payments in marital dissolution cases. The court stated: "Just as a court lacks authority to set the original amount of alimony payments in a dissolution case, a court also lacks authority to modify the amount of alimony payments originally agreed to by the parties." 473 N.E. 2d 811, 813 (Ohio 1984).

Consequently, we believe that Norma Jean's claim against the estate for alimony would be the actuarial amount allowed by the government.

B.

The estate also contends, as heretofore stated, that it is entitled to exclude from the gross estate for estate tax purposes Norma Jean's claimed one-half interest in the real estate that

was placed in trust. This contention presents an anomalous situation in that the estate tax return — which has never been amended by the estate in this respect — shows this real estate as being the property solely of Patrick at the time of his death. This is to say, this property is listed and given valuation under “Schedule A - Real Estate” as being the property only of Patrick. The only realty listed on the return in “Schedule E - Jointly Owned Property” is a lot in Mohave County, Arizona, valued at \$3000.00, and Norma Jean is shown as having a “½ interest.” Nevertheless, the government does not argue that the estate is thereby estopped as a matter of law to contend that Norma Jean owned a one-half interest in this real estate at the time of Patrick’s death. The government does argue, however, that the estate’s return of the property as having been solely that of the deceased is, at the least, evidence that it was his property. We agree. The estate is, after all, the party plaintiff here, not Norma Jean.

While Norma Jean testified in district court that it was her intent to retain a one-half interest in the property placed in trust,⁶ the documents executed by the parties at or about the time the property was conveyed by Patrick and Norma Jean to the trustee demonstrate beyond doubt that Norma Jean retained only a security interest to guarantee payment of her alimony payments. It is, of course, the intent of the parties to the transaction that controls the result. *Central Trust Co. v. Bovey*, 25 Ohio St. 2d 187, 267 N.E.2d 427, 429 (Ohio 1971)

The trust instrument provides, as the separation agreement provides, that the property was to be held by trustee “for the use and benefit of Patrick” and to secure the payment of alimony to Norma Jean. Further, Patrick assumed all debt and liabilities with respect to the trust property. While the property could only be sold with the consent of Norma Jean, this is consistent with her security interest. Moreover, if Norma Jean had continued to own a one-half interest in the trust property, it would have been somewhat incongruous to provide, as it was provided in the separation agreement, that her alimony would substantially decrease upon remarriage.

⁶The government argues that Norma Jean’s testimony is, in effect, a *post hoc* rationalization. Cf. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971).

Patrick's will, prepared by their attorney and executed shortly after the dissolution of the marriage, states that "I am the owner of certain real-estate which is held by my attorney, J. R. Nīeberding, pursuant to the Separation Agreement. . . ." The will further provides that the trustee of the property can settle Norma Jean's alimony claim and that, if Norma Jean declines to settle, the trust would continue with Tara C. Trent as trustee. The will further provides that upon the termination of the trust either by Norma Jean's settlement of her alimony claim or her death, the entire trust property was devised to their two daughters. In short, the will makes clear that Norma Jean would either receive a settlement of her alimony claim or the periodic payments provided in the settlement agreement until her death, after which the trust property would devolve to the two daughters. There is no indication in the will that any part of the trust property belonged to or would revert to Norma Jean.

Under these circumstances, we believe that a determination by the district court, if it had made such a determination, that Norma Jean owned one-half of the trust property (subject to the mortgages) at the time of Patrick's death and that therefore such interest of Norma Jean should be excluded from the gross estate, would have been clearly erroneous.

IV

Accordingly, we find and determine that the executrix of the estate of Patrick R. Collins is not entitled to a refund of estate taxes paid, and therefore the decision of the district court is **REVERSED** and the cause is **REMANDED** for dismissal.

DAVID A. NELSON, Circuit Judge, dissenting. It seems to me unlikely that the courts of Ohio would deny Norma Jean Collins a revisionary interest (or what amount to a revisionary interest) in the nearly three million dollars' worth of jointly owned real estate, acquired during coverture, that she and Patrick Collins placed in trust upon the dissolution of their marriage. From the standpoint of an Ohio common pleas court judge, elected by the voters to exercise all of the powers of a court of equity, I am persuaded to that the case hypothetically presented by Mrs. Collins would look very appealing indeed.

Here we have an obviously unsophisticated woman, married at the age of 18, who worked at her husband's side year after year in the family plumbing and construction business. The business evidently prospered. Norma Jean Collins contributed to the success of the enterprise, and she shared in the fruits of that success: "I worked as hard as he did," she testified, "and we owned everything 50/50." Nothing in the record suggests that this testimony was not credible.

When, after nearly a quarter of a century of marriage, the couple decided to go their separate ways, they consulted Attorney J. R. Nieberding, who had represented Patrick Collins in business and other matters for more than a decade. It was Patrick who had been the client, not Norma Jean, and Attorney Nieberding quite properly advised Mrs. Collins to seek other counsel. She chose not to do so. Nieberding then agreed to represent both parties in drafting a separation agreement.

The agreement was intended, as its purpose clause recites, "to make an *equitable* distribution of their property . . ." (emphasis supplied). Their property included the real estate (basically construction, office and warehouse property) that the couple had acquired in Hamilton County, Ohio, during the 1960s and 70s. It has been stipulated by the litigants in the present lawsuit that the property was "jointly owned." This stipulation was accepted as accurate by the district court, and its accuracy is borne out by the deposition of Norma Jean Collins. "It was half my property too," she testified, going on to explain that:

"My name was on the deeds; my name was on the mortgages. It was half mine; it was never all his."

Although the deeds to most of the properties (ten in number, by my count) named as grantees "Patrick R. Collins and Norma Jean Collins," or Patrick R. Collins and Norma Jean Collins, husband and wife," or "Norma Jean Collins and Patrick R. Collins, husband and wife," there were two deeds in which Mrs. Collins' name did not appear. But the district judge (the late David S. Porter, an experienced and capable Ohio jurist) dismissed this omission as insignificant. Under Ohio law, Judge Porter declared in denying a government motion to reopen the case, "Norma Jean Collins had an equitable interest in all property that came to the couple during their marriage, whether or not her name appears on the deed." The conclusion that Mrs. Collins had at least an equitable interest in half of the real estate has not been seriously challenged by the government — and eight of the deeds gave her a legal interest as well.

Pursuant to the separation agreement drafted by Attorney Nieberding, Mr. and Mrs. Collins executed general warranty deeds conveying legal title in the real estate to Mr. Nieberding as trustee. Under a separate trust agreement, also drawn by Mr. Nieberding, Norma Jean Collins surrendered at least a portion of her equitable interest in the properties. She received, in exchange, certain household furnishings, a Florida savings and loan account, a Chevrolet automobile, three motorcycles, a house in Florida, a hold-harmless agreement on the couple's outstanding indebtedness, a lump sum payment of \$15,000, and the promise of lifetime alimony payments of at \$10,400 per annum (subject to an annual cost-of-living adjustment), plus an additional payment of \$5,000 every third year for the rest of her life.

The fairness of this arrangement need not concern us; whether she acted wisely or not, Norma Jean Collins made the deal she made — and it is perfectly clear that for the joint lives of herself and Patrick Collins, at least, she gave up all of her equitable estate in the Hamilton County property except for security interest designed to ensure that the alimony would be paid in accordance with the agreement. (The record shows, by the way, that the alimony was so paid.)

The critical question is not where equitable title lay during the period when both Patrick and Norma Jean Collins remained alive. During the balance of the couple's joint lives, equitable title clearly lay with Patrick. Both the separation agreement and the trust agreement said so; under both instruments, the property was to be held by the trustee "for the use and benefit of Patrick." But the trust agreement provided that upon the death of either Patrick or Norma Jean, the duties and obligations of the trustee would *terminate* — and the critical question facing District Judge Porter was what happened to the property upon the *termination* of the trust. This is a matter the trust agreement does not address; neither does the separation agreement.

The mere fact that the property had been held for the use and benefit of Patrick for the duration of the trust does not suggest to me that the parties intended the entire beneficial interest to pass to Patrick's estate upon termination of the trust by reason of Patrick's death. The phrase "for the use and benefit of Patrick" presumably means what it says — and it does not say that the trustee is to hold the property for the use and benefit of Patrick's estate after Patrick himself can have no further use for the property. The phrase obviously does not say, moreover, that the trustee has a continuing duty to hold the property for the use and benefit of Patrick's estate notwithstanding the express termination of the trustee's duties and obligations. As Judge Porter declared, citing *Homer v. Wullenweber*, 89 Ohio App. 255, 101 N.E.2d 229 (Ohio 1951), the phrase in question "does not provide indication of where the property is to go upon the termination of the trust."

It is my view that an Ohio court of equity, mindful of the fact that Norma Jean Collins owned a one-half interest in the property before she signed the deeds conveying the land to Mr. Nieberding as trustee, would have little difficulty in deciding on the correct disposition of the property once the trust has terminated. Judge Porter, at least, was very clear on this. Citing, among other authorities, *Lillard v. Lillard*, 63 Ohio App. 403, 26 N.E.2d 933 (Ohio 1939) — another decision from the court of appeals for the very county in which the real estate is located — Judge Porter noted that on termination "the

trustee holds the principal of the trust for the settlor . . .” (Upon termination of the trust, “every title created by the trust instrument is destroyed and the title of the trustor freed of every such title.” *Lillard*, 63 Ohio App. at 412, 26 N.E.2d at 937.) And, Judge Porter continued, “Norma Jean, as joint owner of the properties transferred to the trustee[,] is a settlor [or “trustor”] and therefore is entitled to her share . . .” This is exactly right, in my opinion.

Attorney Nieberding may have lost sight of Norma Jean’s potential interest when, several months after the execution of the separation agreement, he came to draw Patrick Collins’ will. The will purports to give the Collins’ two daughters not only Patrick’s beneficial interest, but Norma Jean’s beneficial interest as well. As Judge Porter recognized in denying the government’s motion to reopen the case, however, the mistake in Patrick Collins’ will can hardly be deemed controlling:

“ . . . we remain unconvinced that Norma was not half-owner of the property in the trust. We find wholly unpersuasive the language the government cites from the will indicating Patrick Collins *believed* he owned all the property in the trust (Doc. 20 at 7). Collins’ belief is uncontrolling on the legal question of Norma Jean’s interest in the property.”

(Memorandum and order of April 28, 1987; emphasis in original.)

Mistakes strikingly similar to that made by Patrick Collins were made by the settlor in *Lillard*. The Hamilton County Court of Appeals said of them that “these subsequent acts and declarations are not effective to directly disturb the irrevocable trust . . . or to indirectly do so by influencing an interpretation of its terms contrary to the words used in the circumstances then existing.” 63 Ohio App. at 405, 26 N.E.2d at 934.

Even if it were enforceable, the mistake in Patrick Collins’ will might make little difference, as a practical matter, aside from whatever bearing it has on the interpretation of the trust agreement. Norma Jean Collins, as her deposition makes clear, was not estranged from her children. Her marriage was dis-

solved, but her family was not. Norma Jean did not remarry, and within 18 months she went back to work at the family business on a full-time basis, doing the bookkeeping for the plumbing side while her younger daughter handled the books for the construction side. (This arrangement continued until Patrick Collins' sudden death from a stroke several years later.) We know that at least one will was prepared for Norma Jean Collins after the dissolution of her marriage. We do not know the will's terms, unfortunately, but we do know who drafted it — Attorney Nieberding. If the will that he drew for Norma Jean Collins followed the same pattern as the will that he drew for Patrick Collins, the two daughters would ultimately take the real estate in any event — and tax considerations aside, it probably would matter little to the daughters whether they ultimately took all of the real estate under their father's will, or half under their father's and half under their mother's. In neither eventuality would the daughters have full enjoyment of the property until both parents were dead — for Patrick's will provided that in the absence of a complete settlement with Norma Jean, all of the property would be held in a testamentary trust to secure payment of the alimony to which Norma Jean was entitled for life. Only such income from the property as might exceed Norma Jean's adjusted alimony payments would go to the daughters during their mother's life.

Turning to the proceeding in which the Hamilton County Court of Common Pleas purported to "modify" the decree by which the marriage was dissolved, I find it interesting that the daughters appeared in that proceeding, that they were represented by counsel, and that they interposed no objection to the modification. Perhaps they would not have been so accommodating had they not known that they stood to take their mother's half interest upon the mother's death.

Be that as it may, I agree with the panel majority that notwithstanding the incorporation of the Collins' separation agreement in the original decree of dissolution, it was beyond the power of an Ohio court to modify the separation agreement. Where the separation agreement and trust agreement were silent, however — as they were on the question of what happened to the real estate upon termination of the trust — it

would obviously not be beyond the power of an Ohio court to speak. And I read the modification decree as providing a rather clear indication of what an Ohio court would say on that score; it would say that when the trust terminated, the property would have to be returned to the settlors or their testamentary representatives.

In addition to conforming to well established precedent, such a holding would work to the advantage of a lady who typifies the sort of person whose interests chancellors have always been solicitous to protect. Norma Jean Collins, to repeat, is an unsophisticated woman, despite her substantial means, undertook to negotiate the separation and trust agreements without any legal advice beyond that provided by her adversary's lawyer. If an Ohio chancellor were called upon to resolve any ambiguity as to what the instruments so negotiated actually said — and what they did not say — it is inconceivable to me that the character of the woman, and the circumstances under which the woman was acting, would be ignored. I dare say such a notion would have been equally inconceivable to Judge Porter.

I agree with Judge Porter, finally, on his treatment of the mortgages that Mr. and Mrs. Collins placed on their real estate before putting the real estate in trust. The property was still mortgaged when the trust terminated, and the value of what Norma Jean Collins got back upon the termination of the trust could not have exceeded the value of the equity of redemption in her half of the trust property. (I might quibble with Judge Porter about the deduction he made in respect of alimony paid prior to Patrick's death, but no one has made an issue of that.) Although I do not agree with Judge Porter's reasoning in its entirety, I think the result he reached was essentially correct. I would affirm the judgment.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

TARA C. TRENT, Executrix of the Estate of
PATRICK R. COLLINS, Deceased
Plaintiff - Appellee Cross - Appellant

vs.

UNITED STATES OF AMERICA,
Defendant - Appellant Cross - Appellee

BEFORE: MERRITT, Chief Judge; NELSON, Circuit Judge;
and BROWN, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellee-cross-appellant, the court concludes that the issues raised therein are fully considered upon the original oral argument and decision of this case.

It is therefore **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

Judge Nelson dissents to the denial of this petition.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

